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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1077

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, et al,
Petitioners,

v.

JAMES JONATHAN MAPP, et al,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RAYMOND B. WITT, JR.,
Witt, Gaither, Richardson, Hennin & Whitaker
1100 American National Bank Building
Chattanooga, Tennessee 37402
Attorney for Petitioners

COURT NEWS PRESS, INC. — 419 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States District Court, Eastern District of Tennessee, Southern Division, made and entered in the above entitled cause pursuant to the memorandum opinion entered on November 16, 1973, and/or the affirmance of said opinion of the district court filed by the United States Court of Appeals for the Sixth Circuit on October 20, 1975.

OPINIONS BELOW

DISTRICT COURT

The opinion of the United States District Court for the Eastern District of Tennessee, Southern Division, announced on November 16, 1973, is reported at 366 F.Supp. 1257. The

final order was dated December 18, 1973. On December 26, 1973 respondents filed a motion to amend the Memorandum Opinion and for a new trial and for further relief. Subsequently, on January 7, 1974 said motion was supplanted by an amended motion to amend, for a new trial and further relief. On June 20, 1974, the district court filed a memorandum on pending motions deciding that respondents' motion and amended motion for a new trial and for further relief of January 7, were without merit and should be denied. On July 12, 1974 the respondents' notice of appeal from said denial of their motion was filed in the United States Court of Appeals for the Sixth Circuit. On July 22, 1974 petitioner's notice of appeal from the Memorandum Opinion of November 16, 1973 and the Order of December 18, 1973 was filed in the United States Court of Appeals for the Sixth Circuit.

COURT OF APPEALS

Following briefing and appellate oral argument on April 18, 1975, the appellate court rendered a decision affirming the district court with a dissenting opinion by Judge Edwards.[1] Respondents' "Motion for Rehearing or Rehearing en banc" was filed on November 4, 1975 with an "Amended Petition for Rehearing and Suggestion of Rehearing en banc" being filed on November 24, 1975 pursuant to a grant of an extension of time in which to file having been noted on November 4, 1975. Respondents' amended petition of November 24, 1975 requested the United States Court of Appeals for the Sixth Circuit to delay acting upon respondents' motion for a rehearing until this Court's decision in the case of *Spangler* v. *Pasadena City Board of Education, et al*, 519 F.2d 430 (9th Cir. 5/5/75) cert. granted 11/11/75. (44 U.S.L.W. 3271, 75-164).[2]

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[1] A copy of the opinion of the appellate court of October 20, 1975 affirming the district court is attached hereto as *Appendix A*.

[2] Respondents amended petition of 11/24/75 is attached hereto as *Appendix B*.

BLEED THROUGH

As of the date hereof, the United States Court of Appeals for the Sixth Circuit has not acted upon said Petition by respondents for a rehearing and suggestion of rehearing en banc coupled with a request which is, in effect, a motion to stay the proceeding in the Sixth Circuit in this cause pending a decision by this Court in *Spangler*, supra.

JURISDICTION

The judgment of the district court continuing the injunction to which the respondents complain and thus which is in favor of the petitioner, was entered on November 16, 1973. Respondents docketed an appeal in the Court of Appeals on September 30, 1974 and the petitioner's appeal was docketed on the same day. The Court of Appeals entered its opinion on October 20, 1975, (*Appendix A*). Respondents' petition for rehearing and a suggestion of rehearing en banc filed on November 24, 1975 has not been acted upon. Jurisdiction of this Court is invoked under Title 28 of the United States Code, § 1254(1), providing for the granting of a writ of certiorari upon the petition of any party before or after rendition of judgment by the court of appeals.

QUESTIONS PRESENTED

The questions presented which were correctly resolved by the district court are: Whether a formerly de jure dual school system is under a continuing annual responsibility to assign white children throughout the school system in such a manner as to avoid having any schools with a racial balance disproportionate to the system-wide racial balance where such racial disproportion as now may exist in the system "is not the result of any present or past discrimination upon the part of the Board or other state agency," but "rather is a consequence of demographic and other factors not within any reasonable re-

sponsibility of the Board."?[3] The district court's answer was in the negative.

The second issue correctly decided by the district court is as follows: Whether once a de jure school system has implemented a desegregation plan, as approved by the district court and the court of appeals, with petition for certiorari having been denied by the United States Supreme Court, is there any Constitutional requirement that additional white students received into the school system through annexation subsequent to the District Court order be dispersed throughout the system in order to achieve a racial balance systemwide? The district court's answer was in the negative.

The October 20, 1975 2-1 decision of the court of appeals affirms the district court without any qualifications.

On the appeal by petitioners, the issue incorrectly decided by the district court was: Whether school authorities are constitutionally required to make an effort to counter the actual and continuing withdrawal of white students from the system (and resegregation) by permitting substantially all-black schools when experience within the school system clearly indicates that absent countermeasures a continuing white withdrawal resulting in a substantially all-black school system is a probability. The district court's answer was in the negative.

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[3] *Mapp* v. *Board of Education of Chattanooga*, 329 F.Supp. 1374, 1382 (affirmed 477 F.2d 851) (6th Cir. 1973), cert. denied, 414 U.S. 1022 (1973). As to the Junior High Schools the district court said:

> "Rather, such limited *racial imbalance* as may remain is the consequence of demographical, residential, or other factors which in no reasonable sense could be attributed to School Board action or *inaction*, past or present, nor to that of any other state agency. The Court is accordingly of the opinion that the defendants' plan for desegregation of the Chattanooga junior high schools will eliminate "all vestiges, of state imposed segregation" as required by the *Swann* decision."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the equal protection clause to the Fourteenth Amendment to the United States Constitution. There are no statutory provisions involved.

STATEMENT

The Action Under Review Here

This petition seeks to review a judgment of the district court in a school desegregation case where the district court refused to order the submission of a new desegregation plan where two high schools remained substantially all-black in spite of affirmative efforts to desegregate said schools and where subsequent territorial annexation would appear to provide additional white students in the system. Such is the essence of respondents' appeal, Case No. 74-2100. The court of appeals affirmed. The district court's opinion also refused to allow petitioner to amend the previously approved desegregation plan involving decisions based upon race, contiguous busing, pairing, clustering, and racial gerrymandering of zones. The limited amendment was sought by petitioner in order to receive the court's permission to implement changes in the desegregation plan designed to diminish the white withdrawal from the system. The court of appeals affirmed.

Factual Background

On July 22, 1955, the petitioner issued its initial statement of policy with reference to the decisions of the United States Supreme Court of May 17, 1954 and May 31, 1954 on the subject of desegregation in public schools. The opening paragraph of said statement read as follows:

> "The Chattanooga Board of Education will comply with the decision of the United States Supreme Court on the matter of integration in the public schools."[4]

The Board immediately undertook a process of elucidation with the formation of an interracial advisory committee.[5]

The elucidation process was continued until this litigation was filed on April 6, 1960. A gradual desegregation plan was approved in 1962 with 16 selected elementary schools being desegregated in September of that year in grades one, two, and three. All dual zones would have been abolished by 1968. At that point in time such was presumed to be compliance with the constitution.

The pace of the desegregation was accelerated pursuant to district court order following a motion for further relief by plaintiffs, filed March 29, 1965. The complete elimination of dual zones in all grades was effected by December, 1966. Subsequent to affirmance by the court of appeals,[6] the only issue remaining was that of faculty assignments until February of 1971 when the district court dismissed a motion by respondents for summary judgment, but set an evidentiary hearing classifying the issues for trial and placing the burden of proof upon petitioners to prove that the actions taken by petitioner met the obligation to establish a unitary school system.

Shortly after this Court's opinion in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (4/20/71) in May, the evidentiary hearing was completed and a new desegregation plan was ordered to "maximize integration" requiring for the first time decisions based upon race for the purpose of achieving an adequate constitutional remedy.[7] Initial implementation of the 1971 desegregation plan began

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[4] The complete text of this statement appears as *Appendix C*.

[5] The opening statement to the committee of November 15, 1955 appears as *Appendix D*.

[6] 373 F.2d 75 (1967)

[7] 329 F.Supp. 1374 (1971).

in September of 1971 under the supervision of the district court.

Respondents took an appeal from this decision on the basis that the deviations from a racial balance were unacceptable and unconstitutional. A cross appeal was taken by petitioners contending that remedial measures permitted by this Court in *Swann* were only permissible in a school system found to be in default of its constitutional obligation, and that the petitioner was not in default. Petitioner further contended that the district court opinion in its reference to maximizing integration read the racial balance language in *Swann* as being constitutionally mandatory and not merely "a starting point."

In a 2-1 appellate court decision rendered on October 11, 1972 the case was remanded to the district court. Following a motion for rehearing and suggestion of rehearing en banc by respondents, a rehearing en banc was granted with oral argument taking place on December 14, 1972. On April 30, 1973, 477 F.2d 851, an en banc decision of the court of appeals reversed the 2-1 decision and affirmed the district court's opinion.[8]

In the summer of 1973 and as a result of the experience of two years under the amended desegregation plan, the petitioner, having experienced substantial white withdrawal of students from the system, conducted a careful evaluation of the system, the possible causes of the withdrawal from the schools, and a projection of the possible impact upon the system of additional busing projected for full implementation. Recognizing the probable constitutional obligation upon a Board to avoid inaction which might contribute to resegregation, petitioner, on July 20, 1973, filed a Motion for Further Relief: to Adjust Amended Plan of Desegregation, as filed June 16, 1971. An extended evidentiary hearing was held in October of 1973 in which the actual experience of the petitioner in September of 1971, September, 1972, and September, 1973

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[8] 477 F.2d 851, with Judge Weick and O'Sullivan dissenting and with a separate concurrence by Judge Miller.

was presented to the court, as well as the petitioner's plan for attempting to counter the white withdrawal reflected by the statistical data for the three years in question.

In rebuttal, respondents offered testimony with reference to the probable impact of the completion of annexation (then imminent) of certain areas contiguous to the Chattanooga system with said areas being populated predominately by white students.

Petitioner's motion to amend the plan was denied in an opinion, which is the subject of this appeal, entered on November 16, 1973. In this opinion specific guidelines were provided petitioner as to the creation of zones with reference to annexed schools and the adjustment of zones within the system and further providing that any such creation or adjustment of zones would be required to be submitted to the federal court 30 days prior to their effective date.

However, respondents filed a motion to amend the Memorandum Opinion of November 16, 1973 and for a new trial and for further relief on December 26, 1973, supplementing said motion with an amendment on January 7, 1974. Following the district court's denial of this motion as amended on June 20, 1974 respondents filed a notice of appeal on July 12, 1974 requesting a complete new desegregation plan for the Chattanooga system. Petitioner's appeal was filed on July 22, 1974. Both cases were docketed on September 30, 1974. For a more complete statement of the facts from July 1955 forward, see *Appendix E* attached hereto.

The appellate oral argument was held on April 19, 1975 with a 2-1 decision affirming the district court without qualification on October 20, 1975.[9] Thereafter, the respondents filed "Motion for Rehearing or Rehearing en banc" on November 4, 1975, followed by a "Amended Petition for Rehearing and Suggestion of Rehearing en banc" on November 24, 1975,

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[9] Appendix A.

pursuant to a grant of extension of time in which to file said amendment, having been noted on November 4, 1975.[10]

In the interim between the filing of the original motion for rehearing and the filing of the petition for rehearing, this Court granted certiorari in the case of *Pasadena City Board of Education, et al.* v. *Nancy Anne Spangler, et al.* and *United States of America*, No. 75-164, on November 11, 1975.

In the amended petition of November 24, 1975 respondents brought to the attention of the court of appeals the second question presented in the Petition for Writ of Certiorari filed on behalf of the Pasadena City Board of Education which reads as follows:

> "2) Is a school system required to amend its judicially validated desegregation plan to accommodate for annual demographic changes for which it is in no way responsible? *Id.*, at 3271."

The respondents went on to suggest that this Court's decision in *Spangler* might clarify the language of *Swann* with respect to the need for "year to year adjustments" and provide guidance to the court of appeals in re-evaluating its decision in the Chattanooga case. In the conclusion to their petition of November 24, 1975 respondents went on to request that any action upon their motion for rehearing be stayed, pending the Supreme Court's decision in *Spangler*, supra.

Upon receiving notification on November 11, 1975 of the action of this Court in granting certiorari in *Spangler*, petitioner's counsel requested and received a copy of the Petition for Writ of Certiorari filed on behalf of the Pasadena School Board. Following an analysis of this petition, petitioner sought and received permission from counsel in the *Spanger* case to file an amicus curiae brief in that case. Such brief was filed in the last week of December.

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[10] Appendix B.

REASONS FOR GRANTING A WRIT

1. The Pasadena Case

The action by the respondents in introducing the *Spangler* case into the instant litigation reflects a decision upon the part of counsel for respondents to the effect that certain issues presented in the *Pasadena* case may well be equally applicable to the issues in the *Chattanooga* case to the point that a decision in the *Pasadena* case could be determinative of one or more issues in the *Chattanooga* case. A decision in the *Spangler* case could result in guidelines such as to provide a basis for the United States Court of Appeals for the Sixth Circuit reaching a decision adverse to that of the petitioner upon the petition for rehearing now pending in that court. In this posture this Court could appear to have adequate reasons for denying any subsequent petition for writ of certiorari which might be submitted by petitioner in the event of an en banc reversal of the October 20, 1975 decision of the three judge court affirming the district court in the *Chattanooga* case. In deciding upon new guidelines, petitioner submits the Chattanooga facts could be of compelling significance to this Court.

2. Experience Indicates The Need To Amplify The Swann Guidelines

This Court made the following statement in *Swann,* supra at page 14:

> "The problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, *however incomplete and imperfect,* for the assistance of school authorities and courts." (Emphasis added)

Petitioner interprets the above language as indicating an awareness upon the part of this Court that the language in *Swann* would be interpreted by various school boards, their

counsel, district courts, and appellate courts as guidelines in designing an adequate constitutional remedy. These guidelines would be generally applicable, but would have to be applied to the specific factual situations under consideration. That the guidelines of *Swann* were not final guidelines, but might possibly need further amplification is clearly evident from the language this Court used in the above quotation from *Swann*.

There is now abundant evidence that the guidelines of *Swann* are incomplete and imperfect, as interpreted by the district courts and courts of appeals. Five years has provided school authorities and their counsel, district courts, and appellate courts with a great variety of experience in attempting to apply the guidelines of *Swann* to the school system throughout this country.

Illustrative of the wide variation in interpretations of the guidelines of *Swann* is the following. In the case *of Goss, et al* v. *The Board of Education of the City of Knoxville, Tennessee*, 444 F.2d 632 (1971), at page 636 the *Mecklenburg* pattern was referred to as "legally tolerable" reflecting an interpretation by appellate jurists that the remedies reflected in *Swann* were *permitted* as contrasted with being *commanded*. However, there is abundant evidence of decisions by district and appellate courts clearly reflecting their hesitation at approving any plans where there is any substantial deviation from a racial balance; and this in light of this Court's strong language in *Swann* referring to the necessity of a reversal of Judge McMillan should his opinion be read as an interpretation that a mathematical racial balance was a constitutional requirement; and further, that a racial ratio was only to be used as a starting point.

The "legally tolerable" interpretation is to be contrasted with the decision of Judge Real in *Spangler* where the net effect of his opinion is to make a mathematical ratio a constitutional requirement in the sense that he condemns a ma-

jority of a minority school under any and all circumstances during his lifetime.[11]

It must now be obvious that in school systems where the facts are different, different remedies are required. To illustrate, if a school system is majority black or is in that vicinity, remedies in such school system must be different from a school system where the black minority percentage of the total school population is small or less than twenty-five percent. Judge Real is not the first district judge to condemn a majority of a minority school out of hand as unconstitutional. Nevertheless, in the Chattanooga system, where there was a majority black population at the time of the district court opinion under consideration, there is no way that a majority black school could be avoided. Thus, a majority black school is unconstitutional in California, but it is constitutional in Chattanooga.

The above certainly raises a question as to the conflict between the Sixth Circuit's interpretation of this particular part of the *Swann* guidelines and that of the Ninth Circuit as is implicit in that circuit's affirmance of Judge Real's decision in *Pasadena*. There are distinguishing facts between *Pasadena* and *Chattanooga*. It is possible that these facts might support and explain what appears to be a contradictory application of the constitution. However, such is pure speculation, absent any clarification by this Court as to the applicability of mathematical ratios to different school systems.

3. Apparent Conflict Between The Eighth And The Sixth Circuits — Omaha.

There also is a conflict between the Eighth Circuit's interpretation of *Swann* and that of the Sixth Circuit. Such is evidenced by the decision of the Eighth Circuit in *U.S.A. and*

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[11] *Spangler*, supra, p-440 — "Prospectively, I reject the edict that there shall never be a particular school with a 'majority of any minority' or a majority of any minority so long as '[the district judge] live[s].'"

Webb, et al v. *School District of Omaha, et al,* 521 F.2d 530, decided on June 12, 1975 with rehearings denied on July 7, 1975, in which this Court denied certiorari on November 11, 1975, 44 U.S.L.W. 3273, No. 75-270. In reversing the district court, the court of appeals remanded to the district court with instructions to take specific steps in order to gain compliance with the constitution.

By these instructions, the Eighth Circuit ruled as a constitutional matter that if a school had black enrollments between 5% and 35% such was to be considered integrated and, by implication, constitutionally correct. Secondly, where the black enrollment was presently below 25%, the Eighth Circuit specifically prohibited the operation of the plan increasing the black enrollment above 25%. The court pointed out:

> ". . . This policy will discourage the labeling of addtional schools as 'black,' will hopefully discourage 'white flight,' and will further integration in the district."

Thirdly, the court went on to say that where the ratio of black to white students at schools which presently have a black enrollment between 25% and 35%, such ratios were not to be significantly increased by operation of the plan, "and in any event, the outer limit shall be set at a level not to exceed 35% black enrollment."[12] And last, in any school where the black enrollment exceeded 35% such was to be altered so that the black enrollment at such schools drops to a level not to exceed 35%.

The testimony in the *Chattanooga* case in October, 1973 was essentially that experience with a substantial proportion and number of schools, over a significant period of years indicated that when the black enrollment in a formerly white school approached 35% it could be expected that the black enrollment in that school would increase radically after reaching the 35% point, and that the school would become virtually

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[12] *U.S.A.* and *Webb,* supra, p. 547.

all-black in a short period of time. The fact that this has been the actual experience in the Chattanooga School System was well known in the community, thus contributing to the withdrawal of white students in schools where the black enrollment appeared to be approaching thirty-five percent. The district court found that this threat was not sufficiently significant to justify a school board, in designing and implementing a plan where black enrollment would be limited to 35%, for the reason that in Chattanooga this would require the continuation of some substantially all-black schools.[13] Thus, it is against the Constitution to have more than 35% black students in any school in Omaha while this is not true in Chattanooga. Again, this can be justified perhaps on the basis of the varying facts. Nevertheless, the court of appeals in Omaha took a completely different attitude toward the introduction of evidence with regard to white flight than did the district court judge in the *Chattanooga* case.[14]

4. Apparent Conflict Between The Sixth and The Fifth Circuits – Atlanta.

And in the area of white flight there is a conflict between the Sixth Circuit and the Fifth Circuit as represented in the case of *Ca'houn, et al* v. *Cook, et al,* decided on October 23, 1975, 522 F.2d 717, involving the Atlanta School System just over 100 miles from Chattanooga. Here was a system that

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[13] *Mapp,* 366 F. Supp. 1257, "The difficulty with the Board's entire position, simply stated, is that it is based upon a mistaken legal premise."

[14] *Mapp,* Supra, p. 1260 "The Court is not unsympathetic to the concern expressed by the Board for minimizing the voluntary departure of white students from the system. It must be apparent, however, that this objective cannot serve as a limiting factor on the constitutional requirement of equal protection of the laws, nor as a justification for retaining de jure segregation. Concern over 'white flight,' as the phenomenon was often referred to in the record, cannot become the higher value at the expense of rendering equal protection of the laws the lower value."

was *70% white* at the initiation of the litigation, but now is *85% black*. According to the opinion, the principal objective of the plan which had been in operation for two years was "to achieve at least 30% black enrollment in every majority white school in the system . . ." Appellants appealed because the system had never utilized non-contiguous pairing and had never bused white children into predominately black schools. And even though 92 out of 148 schools in the system were over 90% black, the appellate court affirmed the district court's approval of the plan in operation. The court recognized the impact of white flight when it said:

> "Today hindsight highlights the resulting erosion, revealing that every judicial design for achieving racial desegregation in this system has failed." (Page 718)

Forces beyond the power of the government and the judiciary produced the failure — an obvious practicality. As the Atlanta School Board was successful in this litigation at the appellate level, it is our understanding that they do not intend to appeal. We also understand that the plaintiffs in that action also do not intend to appeal and we can understand why. Nevertheless, the holding in the *Atlanta* case recognizes principles, constitutional and otherwise, that were considered to be irrelevant and immaterial in the *Chattanooga* case particularly in the area of the recognition and relevance of the withdrawal of white students in the system during the course of implementing a desegregation plan based upon decisions being made with regard to race.

5. Need To Minimize Desegregation Litigation

Extensive, protracted school desegregation litigation is detrimental to public education and is burdensome upon the federal court system. Clarification of the nature of the obligations of school authorities will assist school authorities in knowing what the Constitution requires of them.

School authorities must make the initial decision as to

the specifics of a desegregation plan. Such requires legal interpretations by counsel for such school authorities. If school authorities have a better idea of what the law requires, the possibility of approval by the district court is enhanced, thus minimizing the time requirement in the presentation of evidence as well as the possibility of a need for any appeal. Uncertainty and confusion as to what *Brown I* and *II*[15] and their progeny require has made decisions to appeal the normal pattern since the district court orders have usually met with substantial resistance. Appeals have been in order for otherwise the school authorities' constituents would claim that their rights had not been adequately represented. School authorities necessarily represent diverse and conflicting interests.

6. General Principles Have Proven Ineffective.

Dual zones were at one time the means of maintaining a segregated school system; and the constitutional command then was understood to require school authorities to cease and desist making decisions upon the basis of race. Decisions should be made "without regard to race."[16] Affirmative actions were introduced in *Green* v. *County School Board of New Kent County, Virginia,* 391 U.S. 430. Compliance was described in various phrases such as "a racially nondiscriminatory school system", page 435, 437; "a unitary, nonracial system," page 436; "a system of public education freed of racial discrimination," page 436; "a unitary system in which racial discrimination would be eliminated root and branch," page 438, the removal of the vestigial remains of a dual school system, the elimination of racially identifiable schools. Time,

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[15] *Brown* v. *Board of Education of Topeka,* I 347 U.S. 483 (1954), II, 349 U.S. 294 (1955).

[16] The Respondents' Motion for Further Relief of March 27, 1965 described the relief requested to include student assignments "without regard to race". p. 1, Vol I, Joint App. U.S. Court of Appeals for the Sixth Circuit, Nos. 71-2006 and 71-2007, 477 F.2d 851 (1973).

the variety of factual situations, as well as the diversity of responses by school authorities have caused such directives to be of minimal assistance to school authorities trying to apply such general language to their own specific facts.

Courts have examined student racial statistics as the practical test to reach a determination, perhaps because of the complexity of evaluating other proof offered. Mathematical formulas have become the test of an adequate constitutional remedy with causation often ignored. The *Pasadena* case is illustrative of this development.

School authorities and district courts are desperately in need now of more specific guidelines if they are to perform their respective legal responsibilities. While general principles are useful, the essential role of the facts unique to each case should be emphasized, for otherwise each school board could be deprived of its day in court and its right to due process including the appellate process, as its own response to *Brown I* and *II* based upon the facts unique to its school system is considered and judged constitutional or not. District and appellate court decisions from every circuit reveal the need for clarification.

7. Continuing Default As A Basis For Continuing Judicial Supervision

Swann, supra, made it clear that judicial authority in desegregation cases was present only where the facts reflected a default upon the part of school authorities.[17] The net effect

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[17] "Judicial authority enters only when local authority defaults." (p. 16).

"• • • that the School Board had *totally defaulted* in its acknowledged duty to come forward with an acceptable plan of its own. • • • It was because of this *total failure* of the school board that the District Court was obliged to turn to other qualified sources • • •." (Emphasis ours) (p. 24).

"In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised *only* on the basis of a constitutional violation. Remedial

of the respondents' petition in the court of appeals is to impose a completely new desegregation plan upon the Chattanooga system, as a constitutional requirement, at a point in time where CBE has been held to be in compliance by the district court, which judgment has been affirmed by the majority opinion in the court of appeals. How is it possible to justify seeking a completely new plan when the district court's own factual finding says there is no default?

From default to compliance to dissolution of the injunction and termination of continued court supervision, is a long road with a multiplicity of temporary way stations along the way. Responses of school authorities to *Brown I* and *II* have revealed infinite variety. Uncooperative, stubborn, recalcitrant boards appear to have much in common with the *Swann* facts. But all boards are not in this category. Default which continues by design, apparent or otherwise, may merit a judicial response such as *Swann* reveals. But is it "default" when the condition continues in spite of every effort to remedy default and continues only because a board fails to predict what the constitution requires?[18] School authorities

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judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters *only* when local authority defaults." (Emphasis ours) (p. 16).

"* * * to review important issues as to the duties of school authorities and *the scope of powers of federal courts* under this Court's mandates to eliminate racially separate public schools established and maintained by state action." (Emphasis ours) (p. 5).

[18] *Mapp* v. *Board of Education*, 341 F. Supp. 193, 200 — "This lawsuit has been in an area where the law has been evolving, and the Court cannot say that the defendants have acted in bad faith in failing always to perceive or anticipate that development of the law. For example, in all of its orders entered prior to the decision of the United States Supreme court in the case of *Green* v. *School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), this Court was itself of the opinion that genuine freedom of choice on the part of students in school attendance was compliance with the Equal Protective Clause of the Constitution. While the Board has vigorously contested the plaintiff's contentions at every stage of this lawsuit, it further appears to the Court that when factual and legal issues have been resolved, the Board has at all times complied or attempted to comply in good faith with the orders and directions of the Court."

in this category in all justice should not receive the same radical treatment as *Swann* produced; and particularly when time now indicates the racial decisions and measures used in *Swann* do not produce the desired result.

Clarification of the default concept as described in *Swann*, would be of such vital importance to the nation that the public interest requires that this Court authoritatively confirm the judgment of the district court and the majority opinion of the court of appeals now subject to a petition to rehear.

8. State Action

There is a need for this Court to reaffirm the salient character of state action as a *sine qua non* to a finding of unconstitutional racial school segregation. It might be thought that this Court had been amply explicit on this principle.[19] The opinion of

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[19] *Green*, supra, included the following:

> ". . . the State acting through the local school board and school officials, organized and operated a dual system, . . . page 435.
>
> "in the context of the State-imposed segregated pattern . . ." page 432.
>
> ". . . then operating State-compelled dual systems . . ." page 432.
>
> ". . . toward disestablishing State-imposed segregation." page 439.
>
> ". . . for dismantling the State-imposed dual system . . ." page 439.
>
> ". . . and the Court should retain jurisdiction until it is clear that State-imposed segregation has been completely removed." page 439.
>
> "A desegregation program to effectuate conversion of a State-imposed dual system to a unitary, non-racial system . . ." page 441.

The opinion in *Swann*, continues such requirement without any hint of qualification:

> "We granted certiorari in this case to review important issues as to the duties of school authorities and the scope of powers of Federal Courts under this Court's mandates to eliminate racially

Judge Real in *Spangler*, supra, makes it clear that the district court considered a majority of any minority school to be unconstitutional without any reference to causation.[20] Nothing in the opinion sheds any light upon what factors operated to alter the student enrollment at these schools from majority white to majority black. That the district judge did not see fit to make any reference to state action as the causative factor must reflect that he considered such irrelevant. Consequently, such provides a basis for alleging that district courts are inclined to ignore consideration of two basic elements in the equations — state action and causation.

A survey of representative district court and appellate court opinions will confirm such trend.

But the district court in the *Chattanooga* case ignored neither state action nor causation. Both were specifically identified and their absence was a primary support to the decision

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separate schools *established and maintained by state action.*" (Emphasis added) *Swann*, supra, p. 5.

". . . state-imposed segregation by race in public schools denies equal protection of the laws." p. 11

". . . where dual school systems had historically been maintained by operation of state laws." Such is followed by a quote from *Green* which includes the term 'state-imposed segregation.' p. 13

". . . . the massive problem of converting from the state-enforced discrimination . . ." p. 14

". . . to eliminate from the public schools all vestiges of state-imposed segregation . . ." p. 15

". . . the responsibilities of school authorities in desegregating a state-enforced dual school system . . ." p. 18

". . . a potent weapon for creating or maintaining a state-segregated school system . . ." p. 21

[20] ". . . so, at the time of hearing of this matter in March of 1974 five Pasadena schools were and remain in violation of the no majority of any minority injunction in this Court's January, 1970, ruling." 375 F.Supp. 1304, 1306.

and the affirmance.[21] The present situation on this issue remains seriously confused to the detriment of all parties and,

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[21] *Mapp*, supra, 329 F. Supp. 1374 (1971) —

> "With regard to the five elementary schools that will retain racial ratios of less than 30% or more than 70% of one race, the Court is of the opinion that the Board has carried the burden of establishing that their racial composition is not the result of any present or past discrimination upon the part of the Board or other state agency. Rather, such result is the consequence of demographic and other factors not within any reasonable responsibility of the Board." (p. 1382)
>
> "To the extent that any student racial imbalance exists in any of the elementary schools, the Court is of the opinion that the Board has carried the burden of establishing that such racial imbalance as may remain is not the result of any present or past discrimination upon the part of the Board or other state agency. Rather, such limited racial imbalance as may remain is the consequence of demographical, residential, or other factors which in no reasonable sense could be attributed to School Board action or inaction, past or present, nor to that of any other state agency." (p. 1383).
>
> "In light of all the record, the Court is of the opinion that the junior high school plan as submitted by the defendants removes all state created or state imposed segregation. To the extent that any student racial imbalance exists in any of the junior high schools, the Board has carried the burden of establishing that such racial imbalance as remains is not the result of any present or past discrimination upon the part of the Board or upon the part of other state agencies. Rather, such limited racial imbalance as may remain is the consequence of demographical, residential, or other factors which in no reasonable sense could be attributed to School Board action or inaction, past or present, nor to that of any other state agency. The Court is accordingly of the opinion that the defendant's plan for desegregation of the Chattanooga Junior High Schools would eliminate 'all vestiges of state imposed segregation' as required by the *Swann* decision." (p. 1384)

In giving final approval to the high school plan in 1973, Judge Wilson had this to say:

> "However subsequent evidence has now demonstrated that changing demographic conditions within the City and other *de facto*

above all, in conflict with the basic welfare and interest of the nation in the maintenance of the highest level of educational opportunity for all.[22] It is imperative that this Court flatly

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conditions beyond the control and responsibility of the School Board, including the voluntary withdrawal of white students from the system, have become causative factors for the present racial composition of the student body in those schools (Riverside and Howard) and not the original action of the Board in creating segregated schools at these locations. It should be recalled in this connection that the Plan previously approved included provision for students to elect to transfer from a school in which they were a majority to a school in which they would be in a minority." 366 F.Supp. 1257 (11-16-73, at page 1261)

The majority opinion of the court of appeals quoted from this portion of Judge Wilson's opinion and then had this to say:

"While the cause of the departure of white students was disputed, there can be little doubt upon the record that the difference between the anticipated mix and the actual attendance of the high schools when the plan was put into effect was due to a substantial departure of white students from the public schools in Chattanooga, a circumstance which the district judge found to have occurred beyond the control and responsibility of the School Board." (App. 3a, 4a)

The Sixth Circuit affirmed Judge Wilson and in doing so clearly found that the district court's actions complied with the Constitution. Such is reflected in the following quote:

"Having implemented the plan for desegregating the high school by establishing zones for attendances which were designed to achieve a high degree of racial balance throughout the system, having provided further for continuance of a majority to minority transfer policy, the district judge conceived that he had obeyed the mandate of *Brown* v. *Board of Education of Topeka, II*, 349 U.S. 294 (1955) *Brown II* and more particularly of *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1971). So do we." (App. 5a)

[22] As this Court said in *Brown I*, supra, p. 493 —

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most

confirm the judgment of the district court in 1971 and in 1973, and the appellate court as to the essential role of state action as a cause of racial segregation in order to establish any violation of the Fourteenth Amendment.

9. Year To Year Adjustments

The closing portions of *Swann* looked forward to the need for "year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." Page 32.

If the volume of school desegregation litigation is to decrease at any time in the near future, "when and under what circumstances" it is appropriate for a district court to relinquish jurisdiction of school desegregation must be clarified for school authorities and district courts.[23] This involves more specific guidelines as to what constitutes both (1) the accomplishment of the affirmative duty to desegregate; and (2) the elimination of "racial discrimination through official action."

The respondents persist in their efforts to eliminate the "official action" element from consideration. The current push for a completely new desegregation plan for Chattanooga is

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basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

[23] FOOTNOTE 1. In *Spangler*, supra, 519 F.2d 430, p. 431:

"We note that one of the basic legal issues presented by this appeal, the question of when and under what circumstances a school district may compel a federal district court to relinquish jurisdiction and end its supervision has not yet been directly addressed by any courts of appeals or by the United States Supreme Court."

consistent with this objective. The respondents are blind to the flat holding by the district court that any objectionable racial imbalance remaining was caused by factors "not within any reasonable responsibility of the board." That the affirmative duty had been accomplished was recognized, explicitly by the court of appeals in its affirmance.[24]

Any realistic comprehension of the applicability of the year-to-year adjustment guidelines set forth in *Swann* compels a careful structuring of a concept including the elements of default, state action, causation, the burden of proof, racial imbalance, affirmative action, and practicalities.[25] However, if we

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[24] "Having implemented the plan for desegregating the high schools by establishing attendance zones which were designed to achieve a substantial degree of racial balance throughout the system, and having provided further for continuance of a majority-to-minority transfer policy, the district judge conceived that he had obeyed the mandate of *Brown* v. *Board of Education of Topeka II*, 349 U.S. 294 (1955) (*Brown II*) and more particularly of *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). *So do we.* Presumably, the district judge might have ordered a further realignment when the first plan did not achieve the proper balance ratio and yet another if that did not hold. Indeed if such were found to have been required to carry out the constitutional mandate to eliminate the vestiges of a dual system, it would simply have to be done, and we have no doubt the district judge would faithfully have carried out that duty. What he was finally faced with here, however, was rather a more subtle and lingering malaise of fear and bias in the private sector *which persisted after curative action* had been taken to eliminate the dual system itself. *Swann* v. *Board of Education* recognizes that this latter may be beyond the effective reach of the Equal Protection Clause:

> 'Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some school.' *Swann* v. *Board of Education, supra,* 402 U.S. at 23." (Emphasis added) (App. 5a, 6a)

[25] *Davis* v. *Board of Commissioners of Mobile County,* 402 U.S. 33 (1971) p. 37:

> "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of desegregation, *taking into account the practicalities of the situation.*" (Emphasis Added)

should consider numerical results as the sole criterion for constitutionality, then state action, causation, and the burden of proof are excluded from further consideration. Such is the approach the respondents are urging upon this Court. But there is no means known for excluding practicalities. Brutal experience in too many school districts serves as constant reminders of the intransigence of human nature as well as the continuing reality of the consent of the governed. As this Court said in *Swann*, "We are concerned . . . not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds . . . One vehicle can carry only a limited amount of baggage." page 22.

But practical limitations appear to be the last in the order of elements to consider. The analysis starts with an allegation of racial segregation. The second step is to identify the presence of official action. If such is absent the inquiry terminates. But if official action is present then the proof must be examined in order to ascertain causation. Are there reasonable grounds for finding that the segregation was caused by the board's action or inaction? If the answer to the question is in the affirmative, then we must proceed to find out if the board has undertaken affirmative action in order to remedy the unconstitutional segregation. If there has been no affirmative effort, such a board is in default and a desegregation plan is mandatory. On the other hand, if the proof reveals affirmative action, then such a board is not in default and we move to an examination of the results of such affirmative action. If these results are less than satisfactory, as is true in the *Chattanooga* case, the character of the affirmative effort should be subjected to careful scrutiny. If the proof shows that such effort was reasonably designed and implemented with an honest effort, has not such a board met its Constitutional obligations under *Brown I* and *II*?

And in this context the practicalities must be given weight. Does a board remain in the posture of default under such circumstances? Does default continue when all alternatives have been exhausted?

Boards throughout the nation are at various points along the roadway to complete compliance. A decrease in the burden of desegregation litigation argues for this Court to speak upon the question of when and under what circumstances a school district may compel a district court to relinquish jurisdiction and end its supervision.[26]

The national interest suggests the immediacy of clarification on this point.

10. Fixed Mathematical Racial Balance

While the facts in *Swann* were unique to Charlotte, the constitutional guidelines contained in *Swann* have been made applicable to 16,400 public school districts in the nation, serving the needs of more than 45 million public school children.[27] Legal advisors to school authorities necessarily have made a critical comparison of the facts in *Swann* with the facts in their client school district. Thereafter, the guidelines of *Swann* were interpreted as applicable to a specific factual setting. The *Swann* facts indicate clearly that Judge McMillan considered the school board members recalcitrant and uncooperative perhaps bordering upon bad faith.[28] To what extent did this factor influence the district judge in the exercise of his broad and awesome equitable discretion?

This Court acknowledged the possibility that it was Judge McMillan's opinion that a "fixed mathematical racial balance" was a substantive constitutional right, going on to say that

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[26] Footnote 1, in *Spangler*, supra.

[27] According to the Tennessee Education Assn. Research Bulletin, 1975, R-5, page 3-5, in 1974 there were 16,400 basic public school administrative units serving 45,074,141 school age children. (Those school districts not having any racial minority within their jurisdiction would be excluded.)

[28] *Swann*, supra, 311 F.Supp. 265 (1970) page 269:

> "14. That the defendants report to the court *weekly* between now and May 15, 1970, reporting progress made in compliance with this order; . . .' (Emphasis Added)

if the district court's holding was to be read as reflecting such a requirement ". . . that approach would be disapproved *and we would be obliged to reverse.*" *Swann,* supra, page 24 (emphasis added).

In the face of this cautionary language, a review of lower court opinions since April of 1971 will reveal constant references to racial balance, followed by reasoning and rulings reflecting extreme reluctance to approve *any* plan which deviated from a racial balance unless there were *convincing* facts available to provide constitutional support for such deviation in the area of causation.

Certainly any survey of post-*Swann* decisions would reveal the fact that the burden of proof has been placed upon school authorities to convince the trial judge that something less than a racial balance can be constitutional. And the benefit of the doubt has been given to the arguments of plaintiffs.

And now we have Pasadena. District Court Judge Real considered the Pasadena Board to be uncooperative, relating in his opinion that the current President of the Board of Education pledged to "Stop Forced Busing" in an unsuccessful attempt to be elected to the Pasadena Board in a recall campaign in April of 1970.[29] That Judge Real had substantial disdain for the Pasadena Board is evident from language in his opinion.[30]

Contrast this with excerpts from the opinions of District Court Judge Wilson in the *Chattanooga* case, *Mapp,* supra, 329 F.Supp. 1374, 1389:

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[29] *Spangler,* supra, 375 F.Supp. 1304, 1306. Also see Footnotes on the same page.

[30] ". . . it takes little educational expertise to recognize that the Pasadena Plan has not had the cooperation from the Board that permits a realistic measurement of its educational success or failure. No one can now estimate the possible results of the Pasadena Plan had it enjoyed the continued support of a Board who would act, as they profess, to 'do unto others as you would have done unto you.'" *Spangler,* supra, p. 1308.

"A school system that has voluntarily placed a black staff member in charge of teacher recruitment and assignment needs no Court-imposed restrictions on potential forms of faculty discrimination which the record clearly and affirmatively shows it does not practice.

"Moreover, the evidence does not indicate that such discrimination is now being practiced within the Chattanooga School System, but rather bears out the testimony of the defendants' witnesses that all such practices have heretofore been eliminated.

"Moreover, the evidence is undisputed that the defendants have heretofore administered their previous transfer plan in a manner that was wholly free from racial or other discrimination.

And then compare the following language in *Mapp*, supra, 341 F.Supp. 193, 200-201 (1972):

"This lawsuit has been in an area where the law has been evolving, and the Court cannot say that the defendants have acted in bad faith in failing always to perceive or anticipate that development of the law. For example, in all of its orders entered prior to the decision of the United States Supreme Court in the case of *Green* v. *School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), this Court was itself of the opinion that genuine freedom of choice on the part of students in school attendance was compliance with the Equal Protection Clause of the Constitution. While the Board has vigorously contested the plaintiff's contentions at every stage of this lawsuit, it further appears to the Court that when factual and legal issues have been resolved, *the Board has at all times complied or attempted to comply in good faith with the orders and directions of the Court.* Accordingly, it has never been necessary for this Court to direct that outside persons or agencies, such as the United States Department of Justice or the United States Department of Health, Education, and Welfare, enter into the lawsuit in aid of the development of a lawful plan of

desegregation or in aid of enforcement. As recently as in its opinion entered upon July 26, 1971, the Court had this to say:

> 'The wisdom and appropriateness of this procedure (i.e., looking to the School Board for the development of a desegregation plan) is further enhanced in this case by the apparent good faith efforts of the Chattanooga school authorities and the School Board to come forward with a plan that accords with the instructions of the Court and its order of May 19, 1971, and with the appellate guidelines therein cited.'" (Emphasis added.)

It is basic to our system of jurisprudence to give opinions of the trial court the benefit of every reasonable doubt prior to reversing a decision. And petitioners agree without reservation.

However, since any decision by this Court in *Pasadena*, supra, may be interpreted to decide a principle applicable to the 16,400 other basic school administrative units in our land, the potential for injustice and unequal treatment cannot be ignored when the constitutional guidelines in question evolved from a fact siuation where the school authorities involved were considered by the district court judge to border upon bad faith. Decisions applicable to recalcitrant boards, could be fraught with unjustice when applied to school authorities making every effort to comply with the Constitution.

There are 154 metropolitan school systems in our nation, each with a total population of in excess of 100,000 people. Each community is unique. The school authorities in each each of the 154 communities possess a combination of characteristics peculiar to their community. Their individual response to *Brown I* and *II* is as varied as the communities. Guidelines emanating from the response of a recalcitrant school board could well prove a calamity for many urban school systems which have made and are making a valiant effort to understand the complexities of urban life while striving to give reality to the ideals reflected in *Brown I* and *II*.

11. The National Interest

Petitioner submits that the above clearly indicates that the national interest requires the prompt settlement by this Court of the grave constitutional questions involved in this case. It is for this reason that petitioner seeks review by this Court of the judgment below in their favor before action by the court of appeals on the pending petition for rehearing. A similar procedure was followed in *Griffin* v. *County School Board of Prince Edward County*, 375 U.S. 391; *Brown* v. *Board of Education*, 344 U.S. 1; *United States* v. *Bankers Trust Co.*, 294 U.S. 240; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330; *Richert Rice Mills* v. *Fontenat*, 297 U.S. 110; *Carter* v. *Carter Coal Co.*, 298 U.S. 238; *Ex parte Quirin*, 317 U.S. 1; *United States* v. *United Mine Workers*, 330 U.S. 258; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579.

IMMEDIATE HEARING

It is safe to assert that the ultimate question presented by this case is of vital importance to the 154 metropolitan public school systems in this country.

Petitioner is prepared to file briefs on the merits promptly following any grant of certiorari. (The case has already been extensively briefed in the district court and the court of appeals.)

CONCLUSION

For the foregoing reasons, it is respectfully submitted:

(1) This petition for a writ of certiorari should be granted.

(2) That this case should be set down for argument prior to a decision in the *Spangler*, supra, case.

Respectfully submitted,

RAYMOND B. WITT, JR.,
WITT, GAITHER, RICHARDSON, HENNISS & WHITAKER
Counsel for Petitioner
1100 American National Bank Building
Chattanooga, Tennessee 37402

January 30, 1976

APPENDIX A

Nos. 74-2100 and 74-2101

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES JONATHAN MAPP, et al.,
Plaintiffs-Appellants (74-2100),
Plaintiffs-Appellees (74-2101),

v.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, et al.,
Defendants-Appellees (74-2100),
Defendants-Appellants (74-2101).

APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed October 20, 1975.

Before: WEICK, EDWARDS and ENGEL, Circuit Judges.

ENGEL, Circuit Judge, delivered the opinion of the Court in which WEICK, Circuit Judge, joined. EDWARDS, Circuit Judge (pp. 7a-17a), delivered a separate dissenting opinion.

ENGEL, Circuit Judge. This desegregation case is once more before the court,[1] this time on cross-appeals from an order of the district court entered June 24, 1974. That order denied motions filed by both parties to modify or amend an earlier order of the court entered December 18, 1973, directed imple-

[1] For previous decisions of this court in this litigation see *Mapp* v. *Board of Education of Chattanooga*, 295 F. 2d 617 (6th Cir. 1961), 319 F. 2d 571 (6th Cir. 1963), 373 F. 2d 75 (6th Cir. 1967), 477 F. 2d 851 (6th Cir. 1973), *cert. denied* 414 U.S. 1022.

mentation of the final school desegregation plan previously approved by the court with certain modifications. The December 18, 1973 order provided as well that "[To] the extent the Court has previously given only tentative approval to the High School Zoning Plan, the same is now approved finally."

Both appeals in effect seek to relitigate all of those same issues which we decided in an en banc decision in this court, reported in *Mapp* v. *Board of Education of Chattanooga*, 477 F. 2d 851 (6th Cir. 1973), *cert. denied*, 414 U.S. 1022 (1973). We there affirmed a final plan of desegregation in all respects except as to the high schools in Chattanooga.

While the district judge had at that time approved the plan as to Kirkman Technical High School, and our affirmance made the same final, District Judge Frank W. Wilson had given only tentative approval to the plan for desegregation for other high schools in the City of Chattanooga, see *Mapp* v. *Board of Education of Chattanooga*, 341 F. Supp. 193 (E.D. Tenn. 1972), being uncertain particularly whether three rather than four general purpose high schools would be feasible or desirable in Chattanooga.

With respect to Judge Wilson's refusal to modify the previous final plan of desegregation, we find that he did not abuse his discretion in so doing, particularly since this court has given its approval of that plan.

Accordingly, we see as the sole issue remaining on this appeal the question of whether the district judge erred in ordering final approval of the tentative plan of desegregation for the Chattanooga high schools.

At the time the tentative plan was proposed, it was anticipated that the zoning for the four high schools would produce a racial balance approximately as follows:

	Black Students	White Students
Brainerd High School	32%	68%
Chattanooga High School	44%	56%
Howard High School	75%	25%
Riverside High School	75%	25%

When, however, the plan was placed into effect in the fall of 1971 rather than having the attendance anticipated, the four high schools experienced the following racial balance:

	Black Students	White Students
Brainerd High School	39%	61%
Chattanooga High School	43%	57%
Howard High School	99%	1%
Riverside High School	99%	1%

While an actual head count had showed that as late as July 1971 there were 393 (29%) white high school students in the Howard High School zone and 311 (29%) white students in the Riverside zone, only ten reported that September to Howard and three to Riverside.

It is the contention of the plaintiffs that a school board's duty in a previously dual and segregated school system cannot be said to have been performed where, after implementation of a plan of desegregation, such an imbalance in the racial mix of the students yet remains. After taking extensive testimony on this issue and on the other issues raised by the parties' motions to amend the earlier judgment, Judge Wilson, in his Memorandum Opinion of November 16, 1973, made the following findings of fact:

> To the extent that the Court has previously given only tentative approval to the high school zoning plan, final approval will now be given that plan. Two high schools, Howard High School and Riverside High School, have not acquired an enrollment of white students as projected by the Board when the plan was proposed in 1971, but rather have remained substantially all black. It was a concern for the accuracy of these projections that caused the Court to initially give only tentative approval to the high school zoning plan. However, subsequent evidence has now demonstrated that changing demographic conditions within the City and other *de facto* conditions beyond the control and responsibility of the School Board, including

> the voluntary withdrawal of white students from the system, have become the causative factors for the present racial composition of the student body in those schools and not the original action of the Board in creating segregated schools at these locations. It should be recalled in this connection that the plan previously approved included provision for students to elect to transfer from a school in which they were in a majority to a school in which they would be in a minority.

While the cause of the departure of white students was disputed, there can be little doubt upon the record that the difference between the anticipated mix and the actual attendance of the high schools when the plan was put into effect was due to a substantial departure of white students from the public schools in Chattanooga, a circumstance which the district judge found to have occurred beyond the control and responsibility of the School Board.

No one who firmly believes in the social and educational value of racial balance in a desegregated school system can help being seriously concerned when such a plan for achieving racial balance does not achieve its objectives on implementation. That such a concern was shared by the district judge is manifest throughout the entire record upon appeal. Nevertheless, the district judge concluded that the demographic changes in the city itself were the cause of the remaining imbalance, a finding which finds support in the record and which we hold is not clearly erroneous.

We are satisfied that, in giving final approval to the high school desegregation plan, Judge Wilson was by no means yielding to irrational concerns over white flight which merely masked inherent Board resistance to integration. To the contrary, he carried out the plan in spite of the apprehended result, and beyond that resisted the defendant Board's further efforts to modify the earlier approved plan for the remainder of the system with this language in his November 27, 1973 opinion:

"The Court is not unsympathetic to the concern expressed by the Board for minimizing the voluntary departure of white students from the system. It must be apparent, however, that this objective cannot serve as a limiting factor on the constitutional requirement of equal protection of the laws, nor as a justification for retaining *de jure* segregation. Concern over 'white flight', as the phenomenon was often referred to in the record, cannot become the higher value at the expense of rendering equal protection of the laws the lower value. As stated by the United States Supreme Court in the case of *Monroe* v. *Board of Commissioners*, 391 U.S. 450 . . . :

> "We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. 'But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of the disagreement with them.'" *Brown II* at 300, . . .

"Moreover, it is the 'effective disestablishment of a dual racially segregated school system' that is required, *Wright* v. *Council of City of Emporia*, 407 U.S. 451 . . . not, as seems to be contended by the defendants, the most 'effective' level of voluntarily acceptable 'mixing' of the races." (Footnote omitted)

Having implemented the plan for desegregating the high schools by establishing zones for attendances which were designed to achieve a high degree of racial balance throughout the system, and having provided further for continuance of a majority-to-minority transfer policy, the district judge conceived that he had obeyed the mandate of *Brown* v. *Board of Education of Topeka II*, 349 U.S. 294 (1955) *(Brown II)* and more particularly of *Swann* v. *Charlotte-Mecklinburg of Education*, 402 U.S. 1 (1971). So do we. Presumably, the district judge might have ordered a further realignment when the first plan did not achieve the proper balance ratio, and yet

another if that did not hold. Indeed if such were found to have been required to carry out the constitutional mandate to eliminate the vestiges of a dual system, it would simply have to be done, and we have no doubt the district judge would faithfully have carried out that duty. What he was finally faced with here, however, was rather a more subtle and lingering malaise of fear and bias in the private sector which persisted after curative action had been taken to eliminate the dual system itself. *Swann* v. *Board of Education* recognizes that this latter may be beyond the effective reach of the Equal Protection Clause:

> "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools."
>
> *Swann* v. *Board of Education, supra,* 402 U.S. at 23

Affirmed.

EDWARDS, Circuit Judge, dissenting. This appeal presents just one significant question: Should we now, under applicable Supreme Court precedent, affirm the District Judge's final order of December 18, 1973, approving a final desegregation order applicable to the Chattanooga high schools?

With all respect for the sincerity of my colleagues, I cannot join the majority opinion, or approve its result. If the majority opinion prevails in this court and in the Supreme Court, it will establish as law the proposition that approximately 60% of the black children in the high schools of the Chattanooga public school system may be continued forever in complete racial segregation in all black schools which were built as such under state law which required a racially dual school system and which have been continuously segregated as such down to this very moment. I cannot square this proposition with the great command of the Fourteenth Amendment to provide all American citizens "the equal protection of the laws."

The rule of this case is all the more significant because the smaller numbers, the maturity, and the greater mobility of high school students tend to make practical accomplishment of high school desegregation the least difficult part of the task mandated by *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954); *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968) and *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971).

The in banc per curiam opinion of the Sixth Circuit (*Mapp* v. *Board of Education of the City of Chattanooga, Tennessee,* 477 F.2d 851 (6th Cir.), *cert. denied,* 414 U.S. 1022 (1973)) constituted unqualified approval of two previously entered opinions and judgments of Judge Wilson, *Mapp* v. *Board of Education of the City of Chattanooga,* 329 F. Supp. 1374 (E.D. Tenn. 1971); *Mapp.* v. *Board of Education of the City of Chattanooga,* 341 F. Supp. 193 (E.D. Tenn. 1972). In these two cases Judge Wilson had approved final desegregation orders concerning the grade schools and junior high schools. Equally

clearly, he had not approved any final desegregation plan for the high schools. As to the high schools, in his first opinion he said:

High Schools

> During the school year 1970-71, the Chattanooga School System operated five high schools. These included four general curricula high schools and one technical high school. Kirkman Technical High School offers a specialized curricula in the technical and vocational field and is the only school of its kind in the system. It draws its students from all areas of the City and is open to all students in the City on a wholly non-discriminatory basis pursuant to prior orders of this Court. Last year Kirkman Technical High School had an enrollment of 1218 students, of which 129 were black and 1089 were white. The relatively low enrollment of black students was due in part to the fact that Howard High School and Riverside High School, both of which were all black high schools last year, offered many of the same technical and vocational courses as were offered at Kirkman. Under the defendants' plan these programs will be concentrated at Kirkman with the result that the enrollment at Kirkman is expected to rise to 1646 students, with a racial composition of 45% black students and 55% white students. No issue exists in the case but that Kirkman Technical High School is a specialized school, that it is fully desegregated, and that it is a unitary school.
>
> While some variation in the curricula exists, the remaining four high schools, City High School, Brainerd High School, Howard High School, and Riverside High School, each offer a similar general high school curriculum. At the time when a dual school system was operated by the School Board, City High School and Brainerd High School were operated as white schools and Howard High School and Riverside High School were operated as black schools. At that time the black high schools were zoned, but the white high schools were not. When the dual school sys-

tem was abolished by order of the Court in 1962, the defendants proposed and the Court approved a freedom of choice plan with regard to the high schools. The plan accomplished some desegregation of the former white high schools, with City having 141 black students out of an enrollment of 1435 and Brainerd having 184 black students out of an enrollment of 1344 during the 1970-71 school year. However, both Howard, with an enrollment of 1313, and Riverside, with an enrollment of 1057, remained all black. The freedom of choice plan "having failed to undo segregation • • • freedom of choice must be held unacceptable." Green v. County School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

The School Board proposes to accomplish a unitary school system within the high schools by zoning the four general curricula high schools with the following results in terms of student ratios:

	Black Students	White Students
Brainerd High School	32%	68%
Chattanooga High School	44%	56%
Howard High School	75%	25%
Riverside High School	75%	25%

The plaintiffs have interposed objections to the defendants' high school plan upon the ground that it does not achieve a racial balance in each school. To some extent these objections are based upon matters of educational policy rather than legal requirements. It is of course apparent that the former white high schools, particularly Brainerd High School, remain predominantly white and that the former black high schools remain predominantly black. However, the defendants offer some evidence in support of the burden cast upon them to justify the remaining imbalance. The need for tying the high school zones to feeder junior high schools is part of the defendants' explanation. Residential patterns, natural geographical features, arterial highways, and other factors are also part of the defendants' explanation.

A matter that has given concern to the Court, however, and which the Court feels is not adequately covered in the present record, is the extent to which the statistical data upon which the defendants' plan is based will correspond with actual experience. Among other matters there appears to be substantial unused capacity in one or more of the city high schools. Before the Court can properly evaluate the reliability of the statistical data regarding the high schools, the Court needs to know whether the unused capacity does in fact exist and, if so, where it exists, whether it will be used and, if so, how it will be used. It would be unfortunate indeed if experience shortly proved the statistical data inadequate and inaccurate and this Court was deprived of the opportunity of considering those matters until on some appellate remand, as occurred in the recent case of Davis v. Board of School Commissioners of Mobile, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577.

The plaintiff has submitted a high school plan with high school zones which the plaintiff's witness has testified will achieve a racial balance in each high school. However, this plan is not tied into the junior high school plan hereinabove approved and the Court is unable to say whether it could be so tied it. Furthermore, the same statistical problem discussed above would appear to exist with regard to the plaintiff's plan.

The Court accordingly is unable to give final approval to a high school desegregation plan at this time. Time, however, is a pressing factor. Pre-school activities will commence at each high school within less than a week, if in fact they have not already commenced. Full commencement of the fall term is only one month away. It is clear that the high schools must move at least as far as is proposed in the defendants' high school plan. Accordingly, the Court will give tentative approval only at this time to the defendants' high school plan in order that at least as much as is therein proposed may be placed into operation at the commencement of the September 1971 term of school. Further prompt but orderly judicial pro-

ceedings must ensue before the Court can decide upon a final plan for desegregation of the high schools.

In the meanwhile, the defendants will be required to promptly provide the Court with information upon the student capacity of each of the four high schools under discussion, upon the amount of unused space in each of the four high schools, the suitability of such space for use in high school programs, and the proposed use to be made of such space, if any. In this connection the defendants should likewise advise the Court regarding its plan as to tuition students. Last year almost one-third of the total student body at City High School were non-resident tuition paying students. There is no information in the present record as to the extent the Board proposes to admit tuition students nor the effect this might have on the racial composition of the student body. The Court has no disapproval of the admission of tuition students nor to the giving of preference to senior students in this regard, provided that the same does not materially and unfavorably distort the student racial ratios in the respective schools. Otherwise, the matter of admitting tuition students addresses itself solely to the discretion of the Board. No later than the 10th day of enrollment the defendants will provide the Court with actual enrollment data upon each of the four high schools here under discussion.

Mapp v. *Board of Education of the City of Chattanooga, supra* at 1384-86.

In his second opinion he said:

Tentative approval only having heretofore been given to the School Board plan for desegregation of the Chattanooga high schools other than Kirkman Technical High School (to which final approval has been given). Further consideration must be given to this phase of the plan. At the time that the Court gave its tentative approval to the high school desegregation plan, the Court desired additional information from the Board of Education as to

whether three, rather than four, general purpose high schools would be feasible or desirable in Chattanooga. It now appears, and in this both parties are in agreement, that three general purpose high schools rather than four is not feasible or desirable, at least for the present school year. Having resolved this matter to the satisfaction of the Court, the defendant Board of Education will accordingly submit a further report on or before June 15, 1972, in which they either demonstrate that any racial imbalance remaining in the four general purpose high schools is not the result of "present or past discriminatory action on their part" Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 26, 91 S.Ct. at 1281, 28 L.Ed.2d 554 at 572, or otherwise, and to the extent that the Board is unable to demonstrate that such racial imbalance which remains is not the result of past or present discriminatory action, they should submit a further plan for removal of all such remaining racial discrimination, the further plan likewise to be submitted on or before June 15, 1972.

Mapp v. *Board of Education of the City of Chattanooga, supra* at 200.

The opinion and order we now review are quite different, and if approved by this Court and the Supreme Court, would represent both a final approval of the school board's current "plan" for operation of the high schools and holding that the present operation represents desegregation of the previously legally segregated dual high school system.

In the opinion we now review Judge Wilson said:

The Court is accordingly of the opinion that the defendants have failed to establish either such changed conditions as would render its formerly court-approved plan of school desegregation inadequate or improper to remove "all remaining vestiges of state imposed segregation" or that its newly proposed plan would accomplish that result.

To the extent that the Court has previously given only tentative approval to the high school zoning plan, final

> approval will now be given that plan. Two high schools, Howard High School and Riverside High School, have not acquired an enrollment of white students as projected by the Board when the plan was proposed in 1971, but rather have remained substantially all black. It was a concern for the accuracy of these projections that caused the Court to initially give only tentative approval to the high school zoning plan. However, subsequent evidence has now demonstrated that changing demographic conditions within the City and other *de facto* conditions beyond the control and responsibility of the School Board, including the voluntary withdrawal of white students from the system, have become the causative factors for the present racial composition of the student body in those schools and not the original action of the Board in creating segregated schools at these locations. It should be recalled in this connection that the plan previously approved included provision for students to elect to transfer from a school in which they were in a majority to a school in which they would be in a minority.
>
> *Mapp* v. *Board of Education of the City of Chattanooga,* 366 F. Supp. 1257, 1260-61 (E.D. Tenn. 1973).

Thus, clearly, we now have before us the issue as to whether or not in the Chattanooga high schools previous unconstitutional segregation has been eliminated "root and branch." *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968).

Defendant-appellees accept (as they must) the responsibility of meeting the standard of *Green* v. *County School Board of Kent County, supra*:

> It is against this background that 13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of respondent School Board's "freedom-of-choice" plan to achieve that end. The School Board contends that it has fully discharged its obligation by adopting a plan by which every student, regardless of race, may "freely" choose the school he will attend. The

Board attempts to cast the issue in its broadest form by arguing that its "freedom-of-choice" plan may be faulted only by reading the Fourteenth Amendment as universally requiring "compulsory integration," a reading it insists the wording of the Amendment will not support. But that argument ignores the thrust of *Brown II*. In the light of the command of that case, what is involved here is the question whether the Board has achieved the "racially nondiscriminatory school system" *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent, then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. See *Cooper* v. *Aaron*, *supra*, at 7; *Bradley* v. *School Board*, 382 U.S. 103; cf. *Watson* v. *City of Memphis*, 373 U.S. 526. The constitutional rights of Negro school children articulated in *Brown I* permit no less than this; and it was to this end that *Brown II* commanded school boards to bend their efforts.[4]

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[4] "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminnate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U. S. 145, 154. Compare the remedies discussed in, *e. g.*, *NLRB* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241;

> In determining whether respondent School Board met that command by adopting its "freedom-of-choice" plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a "prompt and reasonable start." This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for "the governing constitutional principles no longer bear the imprint of newly enunciated doctrine." *Watson* v. *City of Memphis, supra,* at 529; see *Bradley* v. *School Board, supra; Rogers* v. *Paul,* 382 U.S. 198. Moreover, a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. "The time for mere 'deliberate speed' has run out," *Griffin* v. *County School Board,* 377 U.S. 218, 234; "the context in which we must interpret and apply this language [of *Brown II*] to plans for desegregation has been significantly altered." *Goss* v. *Board of Education,* 373 U.S. 683, 689. See *Calhoun* v. *Latimer,* 377 U.S. 263. The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now.*
>
> *Green* v. *County School Board of New Kent County, supra* at 437-39.

At the outset we note that we deal with a school district which at the time of the beginning of this litigation was clearly and concededly a dual school system segregated by race according to state statute. We therefore are required to determine whether or not a public school system (racially constituted during the 1973-74 school year as follows) can be held by this court to have been desegregated "root and branch":

United States v. *Crescent Amusement Co.,* 323 U. S. 173; *Standard Oil Co.* v. *United States,* 221 U. S. 1. See also *Griffin* v. *County School Board,* 377 U. S. 218, 232-234.

	White	Black	% White	% Black
Howard	10	999	1	99
Riverside	3	721	1	99
Chattanooga	439	330	57	43
Brainerd	646	404	61	39

There can, of course, be no doubt that Howard and Riverside High Schools are "racially separate public schools established and maintained by state action." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 5 (1971). Both were built as Negro schools under state law which required a dual school system. T.C.A. §§ 2377, 2393.9 (Williams 1934). Twenty-one years after decision of *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), both high schools (encompassing 60% of the black high school population of Chattanooga) are still (and always have been) essentially 100% black. As to these schools and students, there has been no desegregation at all.

Defendants-Appellees contend that two measures which they took should be accepted as the equivalent of desegregation. They are: 1) the inauguration of a freedom of choice plan, and 2) a change in zone boundaries which was calculated (it is claimed) to introduce 25% of white students into both high schools. Defendants-appellees freely admit that neither measure was effective in changing the segregated character of the Howard and Riverside High Schools.

At to the freedom of choice plans, the Supreme Court has repeatedly held that ineffective freedom of choice plans are not a substitute for desegregation in fact. *See Green* v. *County School Board of New Kent County, supra; Monroe* v. *Board of Commissioners of the City of Jackson*, 391 U.S. 450 (1968).

Defendants-appellees' strongest reliance is upon the second contention that they "zoned" 25% white students into Howard and Riverside but that the white students thus assigned avoided the assignment by "white-flight." As to this measure, we have

no findings of fact concerning defendants-appellees' contention. But if we assumed their truth, we clearly would not have exhausted the possibilities for successful desegregation nor satisfied the constitutional command. Many possibilities for desegregation remain, including pairing of white and black schools and high school construction which would make desegregated zones more feasible. In any instance, the defendant school board should be required to propose a new and realistic plan to meet its constitutional duty. *See Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* at 15-21; *Brinkman* v. *Gilligan,* — F.2d — (6th Cir. 1975) (Decided June 24, 1975, No. 75-1410).

In my judgment the case should be affirmed as to the grade schools and junior high schools. The judgment should be vacated and remanded as to the high schools. All other issues presented by either party should be summarily denied.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-2100

JAMES JONATHAN MAPP, et al.,
Plaintiffs-Appellants,

vs.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, et al.,
Defendants-Appellees.

On Appeal From The United States District Court For The Eastern District of Tennessee

AMENDED PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

Plaintiffs-Appellants, by their undersigned counsel, respectfully pray that, pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure, this Court enter its order granting them a Rehearing and Rehearing *En Banc* in this case, and, in support thereof would respectfully show the Court as follows:

1. Numerous decisions of the Supreme Court and of this Court (previously cited in our original petition for rehearing amended hereby) have established that school boards have a constitutional duty to eradicate vestiges of their dual system "root and branch" and to implement plans that will "work

realistically and work realistically now" to achieve that end. Furthermore, the same decisions have emphasized that a school district's compliance with the requirements of *Brown* v. *Board of Education*, 347 U.S. 483 (1954) and its progency must be judged by results not promises nor projections. They have stressed that where a board fails using one approach to achieve desegregation, it can satisfy its constitutional duty only by resorting to other feasible, viable and judicially-approved techniques to achieve "the greatest degree of actual desegregation."

2. As the facts clearly establish in this case, the Chattanooga Board of Education has *never* altered the one-race, dual character of its high schools. The four high schools at issue here were one-race facilities under the dual system and remain so today. The Board's freedom of choice and geographic zoning plans have glaringly failed to alter the racial compositions of these schools. Nevertheless, it has eschewed, with lower court approval, any reliance upon other judicially-approved remedies such as pairing, clustering, transportation or alteration of feeder patterns from lower grades to the high schools that have proven effective in other districts in satisfying constitutional requirements.

3. This Court has established, by affirming the trial court's approval of a plan that fails to do the job *Brown, supra* mandates, the principle that a board can achieve unitary status without making *any* appreciable change in the character of its schools from their one-race composition under state-imposed segregation. It has given its judicial seal of approval to the proposition that demographic changes and "white flight" can, absent any meaningful desegregation of the system as a result of school board action, convert a dual system to a unitary system.

4. With all due respect, we submit that this Court has, in so doing, violated the spirit and letter of the Supreme Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) where it stated:

> It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies *once the affirmative duty to desegregate* has been *accomplished and racial discrimination through official action is eliminated from the system. Id,* at 32. [Emphasis added]

We suggest that the foregoing language from the *Swann* decision reflects the Supreme Court's view that *something* must happen – meaningful desegregation – before a system can be declared unitary and the need for "year-by-year" adjustments and judicial oversight ceases. Until meaningful desegregation occurs, year-by-year adjustments may be necessary, the Court seems to envision. Yet this Court has rejected such an approach in this litigation.

5. The issue decided by this Court is presently before United States Supreme Court in the case of *Pasadena City Board of Education* v. *Spangler,* No. 75-164 *cert. granted* 44 U.S.L.W. 3271 (November 11, 1975). One of the questions presented there is as follows:

> (2) Is school system required to amend its judicially validated desegregation plans to accommodate for annual demographic changes for which it is in no way responsible? *Id,* at 3271.

We respectfully suggest that the Court's decision in the *Spangler* case should clarify the language of *Swann, supra* with respect to the need for "year-by-year" adjustments and provide guidance to this Court in reevaluating its decision in this litigation.

CONCLUSION

For the foregoing reasons, we respectfully request that the petition for rehearing be granted and that the suggestion of

rehearing *en banc* be duly considered in light of the apparent conflict in this Court's decision with the principles of *Swann, supra.* Furthermore, we request that any action on this petition be stayed pending the Supreme Court's decision in *Spangler, supra.*

Respectfully submitted,

/s/ DREW S. DAYS, III
JACK GREENBERG
JAMES M. NABRIT, III
DREW S. DAYS, III
Suite 2030
10 Columbus Circle
New York, New York 10019

AVON N. WILLIAMS, JR.
404 James Robertson Parkway
Nashville, Tennessee 37219
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

This is to certify that on this 21st day of November, 1975, I served two copies of the foregoing "Amended Petition for Rehearing and Suggestion of Rehearing *En Banc*" upon the following counsel of record by United States mail, postage prepaid:

Raymond B. Witt, Jr., Esq.
W. Frank Brown, III, Esq.
1100 American National Bank Bldg.
Chattanooga, Tennessee 37402

Eugene W. Collins, Esq.
400 Pioneer Bank Bldg.
Chattanooga, Tennessee 37402

/s/ DREW S. DAYS, III
Attorney for Plaintiffs-Appellants

APPENDIX C

CHATTANOOGA PUBLIC SCHOOLS
Chattanooga, Tennessee
July 22, 1955

Statement of Policy of the Chattanooga Board of Education with Reference to the Decisions of the United States Supreme Court of May 17, 1954, and May 31, 1955, on the Subject of Desegregation in the Public Schools

The Chattanooga Board of Education will comply with the decision of the United States Supreme Court on the matter of integration in the public schools.

We have come to this decision after careful deliberation, believing that respect for the law of the land is essentially vital to each and every individual and to the welfare and happiness of all.

The Supreme Court decision does not require immediate and complete integration. Your school Board does not contemplate any immediate change in the operation of our schools.

The Supreme Court, in its decision of May 31, 1955, places the responsibility for solving this problem on the School Board. It requires that we act in "good faith"; that we make a "prompt and reasonable start," and that we comply at the "earliest practicable date." The decision likewise recognizes the need for "practical flexibility" in solving this situation.

The Supreme Court wisely directed the various boards of education carefully to examine their individual local situations before making any final decisions. Consequently, your School Board does not plan to integrate our public schools by September, 1955. Hasty action might well do more harm than good. The Supreme Court's decree recognized this fact.

Your School Board has a responsibility to the entire community, and we will do all we possibly can to discharge this responsibility fairly and justly to all the citizens of our community.

We do not know what the answers may be. We will counsel with the people of our community, seeking their advice and opinions in an atmosphere of earnest and calm deliberation, hoping thereby that as each decision is made, and as each step is taken, the community will accept our decisions and abide by them even though such decisions may be difficult for some to accept. Within the limits of human endurance and considering the many other demands upon the time of the members of your School Board, we will proceed as rapidly as possible to set up a plan to secure the widest possible participation of all of our citizens in finding the answers to this problem that will be fair and just to each and every person in our community. The Board will appoint a continuing interracial advisory committee and provide opportunities for other groups of citizens to present their points of view and proposals for consideration. As we think, plan and discuss together we will grow as a community in understanding and this process will produce ideas for action reflecting the combined wisdom of the community.

The Supreme Court of the United States has declared that "racial discrimination in public education is unconstitutional." It is our clear duty to comply with the ruling. Why? Because we are citizens of the United States of America. As American citizens we have been blessed with benefits far beyond those of any other people since the beginning of time. Being so blessed it is the obligation of every American citizen to uphold the Constitution of the United States – the very foundation of our way of life. We believe that law in its broad meaning protects, defends, and benefits each and every human being in this land of ours. Without law, and without respect for law, and the willingness to comply with law, our society could easily return to the jungle where the only deciding factor in the relationship of one human being with another becomes solely a question of brute force. The ideal of justice which pervades our way of life would then be lost, and the weak, whether physically weak or otherwise, would have no protection from those who are stronger than they.

Respect for the law and acceptance of the law is truly involved in the matter of compliance with the Supreme Court's decision. Should we have said that we would not comply with the decision, we would have been saying that each man is the sole judge of what laws he shall obey. If each man should become the sole judge of his actions, then the stabilizing influence of the law would be weakened and gradually fade away. We will not be a party to what is an attack upon the very foundation of our way of life and all that it has meant and all that it will mean to the welfare and happiness of all of us. We believe that this vital point is necessarily a part of our decision.

As we seek a solution we will make every effort to acquaint the entire community in conferences and through other media of communication of the varied aspects involved. This is not your Board's decision alone. It is a community decision. Although the Board will officially make the decision, each individual in our community must accept his responsibility in solving this question.

Our decision will have its influence and impact upon every phase of our community life. It is of the utmost importance that the great majority of the people accept our decision when finally made. This will be difficult for some – we fully realize this. The thoughtless action of a few could well present situations filled with danger. We know the community hopes and prays that such can be avoided. We know our people will make every effort to see that such is avoided.

It has taken more than seventy-five years to bring our public school system to its present degree of service to the children and the community. It is of the utmost importance that the public school system continue to make progress. It is important that we proceed to a solution of this problem in such a manner that the strength of the public school system is not weakened. In this endeavor we must always be mindful of each and every family, and ever protect the rights of all citizens.

We earnestly request and hope that the community will proceed in its thinking and its actions in a spirit guided by a sense of justice, respect for the law, awareness of the difficulties involved and guided by recognition of the necessity of reaching a fair and just solution. With God's help, this can be accomplished.

CHATTANOOGA BOARD OF EDUCATION

Mrs. J. B. (Sammie C.) Irvine, Secretary
Harry Allen, Commissioner and Chairman
R. E. Biggers
Alf J. Law, Jr.
W. D. Leber
Harry Miller
Raymond B. Witt, Jr.

APPENDIX D

CHATTANOOGA PUBLIC SCHOOLS
Chattanooga, Tennessee
November 15, 1955

Opening Statement by Chairman of the Committee of the Whole to Organizational Meeting of Interracial Advisory Committee

The Chattanooga Board of Education has asked each of you to give of your time and your wisdom as we seek a just solution to the problem of complying with the decisions of the United States Supreme Court holding that racial discrimination in the public schools is unconstitutional.

We deeply appreciate the spirit in which you have accepted this trying task, and we will be ever grateful to each of you for your proven interest and concern for public education and for the welfare of all the children who are now in the schools or who will in the future receive their formal education in the Chattanooga Public School System.

The table of contents in your handbook lists the following materials:

1. A copy of the Supreme Court decision of May, 1954.
2. A copy of the Court's decision of May, 1955.
3. Copies of three recent decisions on the question, one from the Federal District Court at Memphis, one by the Florida Supreme Court, and one by the highest court in Texas.
4. A copy of "What the Court Really Said."
5. A copy of the Board's orignal statement on the Court's decision issued July 22, 1955.
6. A copy of the Board's second statement on the question adopted October 12, 1955.
7. A copy of the statement I am in the process of reading.

A careful consideration of this material will provide a frame-

work of the area in which we will labor – guideposts as we attempt to uncover solutions to our problems.

In our original statement we clearly stated our intention to obey the law and comply with the Supreme Court's decision.

The *good faith* of this School Board, as we seek to comply with the Supreme Court ruling of May, 1955, is of the utmost importance. When we carefully consider the words of the Supreme Court, the importance of acting in good faith is apparent.

The Supreme Court declared the fundamental principle "that *racial discrimination* in public education is unconstitutional."

The Court spoke of "the complexities arising from the transition (Exhibit Two(2) – Page 2) to a system of public education freed of *racial discrimination*"; and said that "solution of varied local school problems" would be required; also that "school authorities have the primary responsibility of elucidating, assessing, and solving these problems."

The Court also said that courts will have to consider whether the action of school authorities constitutes good faith. By courts, they meant primarily the Federal District Court in each locality. The Court directed the Federal District judges to use "practical flexibility" in shaping their remedies and to consider the necessity for "adjusting and reconciling public and private needs."

The Supreme Court went on to say that the Negroes then before the court were entitled to admission to public schools as soon as practicable on a non-discriminatory basis. It spoke of eliminating obstacles "in a systematic and effective manner." It required a "prompt and reasonable start."

The Supreme Court required each school board to make a start toward compliance. They then placed on each school board the burden of proving how much time the public interest required for ending racial discrimination in the public schools.

The justices spoke of "a period of transition." They mentioned the fact that the district courts were to consider the adequacy of plans proposed by school boards.

The Court did not use the word "desegregation" a single time in its decree. It always spoke of discrimination based upon race alone.

This is a brief summary of the Court's decision. We have said, and we have said again, that we will comply with the Supreme Court's decision.

It is now our move – the next step is up to the School Board of the City of Chattanooga. First we must determine what we think the Supreme Court's decision means.

Widely varying interpretations may be given to the United States Supreme Court's two decisions. Words, singly and in groups, are capable of conveying different meaning to different people. Individually, and as a group, the School Board members have studied the decisions and exchanged viewpoints as to exactly what is the meaning of the decision. This analysis has been done with care, and we will continue to study the decisions in order more completely to understand them. In the last analysis we will comply with what we, as a group, believe to be the intent of the Supreme Court in declaring racial discrimination in the public schools unconstitutional.

In its original opinion of May, 1954, the Court had this to say – "Today, education is perhaps the most important function of state and local governments." There may well be some considerable risk that too hasty action in eliminating racial discrimination in the public schools could possibly result in the virtual destruction of the public school system. Certainly the Supreme Court would not destroy the most important function of local government in order to end racial discrimination.

The Court did not order immediate elimination of racial discrimination. It clearly recognized that time would be required. It did not impose a time limit. It placed on each school board the burden of proving how much time was required in its own community. Some may remove racial discrimination immediately without appreciable harm to public education. Some communities may require five years, some

ten years and some even longer. It will depend upon the peculiar and special circumstances found in each community.

The Court ordered us to: (1) elucidate, (2) to assess, (3) to solve. To elucidate means "to make clear, to throw light upon, to explain."

This is what your school board proposes to do with the help of those in the community who are interested. In so doing we intend to and we will act in good faith. It is important that our good faith be apparent to all. Good faith is a state of mind and consequently is difficult to prove. It can easily be a most important factor in our combined efforts to discover a just and fair solution to our common problem.

We firmly and sincerely believe with all our hearts that we have an equal responsibility to each and every child in the school system whether he or she may be white or colored. Our responsibility to the colored child is just as great as our responsibility to the white child. But this responsibility is no greater to the Negro than to the white. Should it develop that some step along the way toward elimination of racial discrimination would probably result in substantial injustice to a white child, your school board would need the wisdom of Solomon.

As we proceed to comply with the Supreme Court's decision as we understand it, we hope always to keep these points in mind.

1. We will act in good faith.

2. We will hear every group and each person who desires to discuss the problem with us within the limits of human endurance and so long as such persons are citizens of Chattanooga.

3. Ours is the responsibility of continuing to do our part to provide the best possible educational facilities for the children of our community.

4. Our responsibility to each child is equal. We will not benefit one child if, in so doing, we harm another child.

5. Your School Board does not presently know what the answer to the problem may be.

In assembling your committee we do not want to create the impression that we are seeking thereby to avoid the responsibility of making the decision. *We have not delegated this responsibility to your committee.* We cannot avoid making the decision as a board.

Then, you may ask, what is your function? We want as broad citizen participation in this decision as is possible. In the selection of your committee we have attempted to secure a broad representation from the entire community. We have selected you as persons of good will from the different sections of the community, from varied religious faiths, from varied economic status, hoping to secure a true cross section of our community. We have not ascertained in advance your opinions, again attempting to secure a group truly representative insofar as it is possible of the varied viewpoints in the community. As we proceed, please feel free to participate fully in the discussions, asking questions when you so desire and interposing your comments and suggestions. Your Board has never been over this road before, so it is impossible accurately to blueprint every aspect of your function as we progress.

As you sit with us you will gain a broadened understanding of the many vital aspects of the problem. You will hear the many varied opinions and viewpoints that will no doubt be expressed. Your depth of understanding will then assist the School Board members accurately and fairly to evaluate the condition. You then can assist to acquaint the community with the problem as it really is, removing doubts, clearing away half-truths and distortions and thereby aid the community to see the problem as it actually exists. We must first clearly define the problem as it actually exists before we can begin to evolve a solution. Your help will be invaluable, for truly, in the last analysis this is a community decision, not solely a decision for the school board. While we may well make the decision, each person in Chattanooga must then

decide whether or not to abide by our decision. We have no effective power to compel compliance. In the last analysis, it is a community decision.

Again may we tell you how deeply we appreciate your assistance. We urge you to participate fully. We know you will.

The problem is serious. We have faith that with God's help we can grow toward the right answers — a situation free from racial discrimination yet with equal justice to all.

APPENDIX E

The Chattanooga History
1955

Immediately following the decision of the Supreme Court in May, 1955, the defendant Board in a series of conferences considered its policy with regard to this decision. On July 22, 1955, an unequivocal decision to comply with the Supreme Court decision was publicly announced, followed the next day by a TV presentation in which all board members participated. The TV program was designed to further explain the policy decision arrived at and the reasoning and motivation that undergirded said policy decision.

Immediately thereafter the Board met in a series of conferences to decide upon and implement the first step in the compliance process. Believing that involvement of a substantial segment of the community was advisable in order to build a solid foundation for the radical change in the school system, the Board decided to form an Interracial Advisory Committee to function over a period of time as the Board attempted to meet the responsibility imposed upon it by the Supreme Court when it stated that school authorities were to have "the primary responsibility for elucidating, assisting and solving these problems; * *" referring to the varied school problems a solution of which would be required in order to fully implement

the constitutional principles enunciated by the Supreme Court with regard to racial discrimination.

The members of this committee were carefully selected by the Board representing a cross-section of the community. Invitation to participate was on an individual basis by requests from Board members.

On October 13, 1955, the decision to appoint such committee and the membership of the committee was released to the general public. Thereafter preparations were made for the organizational meeting of said committee which was held on November 15, 1955. This meeting was disrupted by the presence of citizens who were not members of the committee and terminated without accomplishing its purpose, ending in a near-riot.

By November of 1955 the pressure on the school board was intense and difficult to describe with any degree of adequacy or accuracy. After the above-mentioned meeting the Board met many times to evaluate the reaction of the community to the Board's decision to comply. Three major truths emerged from these discussions: (1) the community resistance to the Board's decision was of such intensity and so widespread, covering virtually all sectors of the white community, that to desegregate in any way within the near future would in all probability result in harm to the cause of public education to an unacceptable extent with the possible destruction of public education as an eventual outcome. The Board was convinced of the second truth (2) to the effect that because of the depth of the emotions evidenced, thoughtful and careful discussions of all aspects of the problem of compliance were impossible except in small groups carefully selected and with there being adequate time for give and take discussion. (3) The third truth that made itself evident was that the Board should address its efforts in the original instance toward securing the understanding and support of community leaders in the religious, professional and business fields.

The Board was aware of the fact that while it had the power to make a decision with regard to desegregation, its

power to compel acceptance of its decision within the school system and within the community did not exist. While the Board did not propose to yield to the community's resistance, it felt obligated to recognize the existence of this resistance, to evaluate the breadth and character thereof, to attempt to provide leadership that would contribute to the lessening of this resistance and to act in such a way with all of its plans and policy decision so as to achieve the maximum probability of the obtaining of compliance with a minimum detriment to the present and future quality of public education in Chattanooga.

The Elucidation Phase
1955-1960

This was the elucidating phase of the Board's actions and efforts over a period of time in many different directions. The Board was convinced that the Supreme Court was correct when it stated that "full implementation of these constitutional principles may require solution of varied local school problems." The Board was faced with problems of a nature completely foreign to its experience and its indivdual preparation. Being satisfied that every adult in the community had a viewpoint and a firm opinion with regard to desegregation, the Board also felt that the community must change its attitudes and that these attitudes could only change if the community faced the problem realistically. It is axiomatic that no problem can be solved until the dimensions of the problem are made clear to the persons who must in the final analysis provide the solution.

The Board had the *power* to place Negro and white children in the same classrooms but the reaction of the children in the classroom, the reaction of their parents and their older brothers and sisters, and their relatives and school personnel and the community in general to this radical change was a reaction over which the Board had no power or influence. The Board was convinced that if the responsible people in the community would face up to the problem and the chal-

lenge – if the community leaders could analyze the circumstances with wisdom and intelligence and good will – that the required change of attitude would occur. The Board was so convinced because as a result of its own careful evaluation of the decision and its impact upon the community and the nation, that the logical and inevitable outcome of a careful evaluative process would so bring the issues into proper focus that an attitude of compliance and a conviction of the necessity of compliance would be the natural outcome. The Board believed there could be no other outcome if reasonable men would apply their intelligence to the relative values involved.

The Board's elucidation effort perhaps was directed toward integration as distinguished from desegregation, and perhaps a responsibility that the Supreme Court did not place upon it. But the Board believed that the cause of public education required more than the mere placing of Negro and white children in the same classrooms, believing that if education were to take place, that the Negro children must be accepted by their classmates without hostility and with friendship, else the educational process for both races in such classrooms would suffer beyond repair and to the detriment of all.

The Board's elucidation process was an impossible undertaking. Yet an effort was made and the Board interpreted and discussed and reasoned and cajoled virtually every day in many different circumstances. The community's emotion was directed toward the Board for they were at hand and could be reached. The Board became the symbol of compliance and received the brunt of this deep emotional resentment that made itself felt throughout our community. The elucidation process was complex.

During the elucidation period the Board's actions were guided by commitment to certain principles. Each decision should be made in the light of its impact upon the quality of the educational process. That such was an acceptable principle is grounded upon the comment made by the Supreme Court in the First Brown Decision that –

"Today, education is perhaps the most important function of state and local government." (p. 493)

Of equal or superior dignity was the Board's obligation to comply with the Supreme Court's ruling. Also in the forefront of deliberations was that the Board was the legal representative of its community, charged with the responsibility of maintaining a system of public education as the community's agent, and as such, legally bound, in ordinary circumstances, to be responsive to the demonstrable, determinable will of the community. And finally, the Board kept in mind that compliance was considered by many to be solely a school problem, and that no other entity, public or private, had any legal responsibility to provide leadership toward recognition of the inevitability of compliance and the problems flowing therefrom.

There was an early recognition of the compelling necessity for strong, forthright, resolute community leadship. This was one of the salient goals of the elucidation program. There was agreement with Dr. Kenneth B. Clark's position taken in October of 1960 in his presidential address to the Society for the Psychological Study of Social Issues that "a clear and unequivocal statement of the policy of desegregation by leaders, prestige figures, and other authorities" is a factor of critical importance if the transition from segregation is to be effective. (Teachers College Record, Vol. 62, No. 1, Ostober 1960).

Recognizing such necessity was one thing. Securing this quality of leadership was another matter. There was no public pressure for such leadership. In fact, the pressure was in an opposite direction. The Board had no power to compel the acceptance of such leadership by any individuals or group. The Board had only the power of persuasion and intensive efforts were made toward this goal.

During this phase, defendants were cognizant of the fact that attitudes would change only after there occurred an intellectual acceptance of the fact that there was no acceptable

alternative to compliance. Every effort was made to drive this point home to the community but the voice of the Board was drowned out by the sounds of defiance. Only events in surrounding states and communities gradually evolved an awareness of inevitability.

From the experience of five years of exposure to the community reaction, from individual discussions, from meetings with groups, from many different sources defendant Board evolved certain judgments that it believed to be sound and capable of substantiation. As these judgments bear directly upon the Board's discharge of its legal responsibility and its stated commitment to act in good faith, it is believed that a recitation of these judgments is important.

1. A substantial majority of the white community honestly believed that the Supreme Court had made an incorrect and unfair decision.

2. Public support for the Board's position with regard to compliance from the white community was virtually nonexistent.

3. The public, in general, originally had virtually no meaningful comprehension of the vital relationship between compliance and the maintenance of law and order and respect for law as a foundation of our society nor the relationship of their individual attitudes and actions to the maintenance of law and order.

4. The Board was not equipped either with sufficient legal power or available manpower to discharge effectively its responsibility to make the problem clear to the community.

5. Deep-seated emotion absolutely prevented the vast majority of the white citizens from making a fair objective appraisal of the circumstances and their own individual responsibility. The circumstances demanded objective consideration; yet effective communication on this subject was possible only in small informal groups held in private where there existed previous personal relationships of a character that make for give and take.

6. The religious leadership of the community, in the early years, made their own individual surveys and soundings of their membership to whom they owed a primary responsibility of leadership and the vast majority then decided that the risks associated with forthright public approval of the Board's position of compliance were risks of such a nature that were unacceptable in the light of their respective positions in their own churches.

7. Objective discussions in a spirit of give and take coupled with the presence of good will, events, time and thought can and have resulted in basic changes in individual attitudes. The elucidation plan has produced tangible, provable affirmable results.

8. Each community has a personality peculiar to itself and to apply on an arbitrary basis a successful plan of desegregation in one community to another community is to disregard facts salient to peaceful desegregation.

9. Actual participation by citizens in a joint effort of decision-making provides a sound foundation for the eventual success of a radical change necessary to any community.

10. If a community will face its problems with its collective intelligence, with reality, and its other resources, it will attain a measure of maturity in the process.

11. Integration and desegregation are different words with different meaning applying to two distinct and separate processes and a recognition of this basic distinction is essential to an understanding of the many facets of the racial discrimination problem.

1960

The Chattanooga suit was initially filed on April 6, 1960, by James R. Mapp as father and next friend of James Jonathan Mapp and Deborah L'Tanya Mapp, minors, and others on their own behalf and on behalf of all other Negro children and their parents in the City of Chattanooga who were similarly situated and affected by the policy practice, custom, and

usage complained of. An injunction was requested against the operation of a compulsory bi-racial school system through the maintenance of a dual pattern of school zone lines based upon race and color, and against the assignment of pupils to schools on the basis of the race and color of the pupils. In the alternative, plaintiffs requested that CBE present a plan for reorganization of the system into a unitary non-racial school system providing for assignment of children on a non-racial basis.

The suit was filed under authority of 28 U.S.C. 1983 and the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

CBE admitted the operation of a bi-racial school system and submitted that it had been, and was then, conducting a program of "elucidation" to prepare the community of Chattanooga for the initiation and carrying out of, and acceptance of, the student desegregation commanded by the *Brown* decision.

CBE represented that further time was needed to continue the elucidation responsibility so that student desegregation might have a reasonable chance of success with minimum harm to the quality of the educational opportunity as more of the community came to accept the requirements of the constitution.

On October 21, 1960, the district court granted the plaintiffs' motion for summary judgment and directed CBE to submit a plan of desegregation, and it was filed on December 20, 1960. This plan was disapproved and the Board was given sixty days within which to submit another plan. The Circuit Court of Appeals sustained the district court's order, 295 F.2d 617 (1961).

The filing of the complaint by plaintiffs on April 6, 1960, required that the Board shift its efforts and attention from working with the community to legal questions required by the defense of the lawsuit. An appeal was taken from the adverse summary judgment for the reason that the Board was of the opinion that the District Court interpreted the Supreme Court's decisions incorrectly. It was, and is, inconceivable

that the Supreme Court would issue a decision requiring such a radical alteration in a long-established social and educational tradition and pattern of living, and then make such decision effective instanter without providing school boards some reasonable period of time in which to make the required adjustments as to the manner in which they had operated their respective school systems.

Petitioners were convinced that it was possible for a situation to exist wherein a school board could, in good faith, begin a process of compliance that was short of physical desegregation of classrooms, and that such action could attain the dignity of "a prompt and reasonable start toward full compliance" within the meaning of such phrase as used by the United States Supreme Court. Until a District Court heard the facts pertinent to a particular school district, a summary judgment was not in order for if a board could prove a posture of compliance, a summary judgment against such board would be improper.

The Chattanooga Board of Education believed a judicial clarification of these points of law as to the practical effect of the Supreme Court's decisions was required if it was to discharge its own legal responsibility. The Board also believed such clarification could well be helpful in providing guidance to many other school boards faced with this dilemma. Such was the rationale, in brief, of the defendants decision to appeal from the adverse summary judgment.

Having lost its attempt to secure an interpretation of the Supreme Court's decision holding that an elucidation program could be found to be "a prompt and reasonable start," the defendant Board submitted a Plan of Desegregation to the Federal District Court in compliance with its directive on December 20, 1960. While such could have been construed as inconsistent with the appeal then in process, the Board was desirous of avoiding the impression that the sole purpose of the appeal was delay.

The plan was carefully conceived and designed through thorough examinations of all available facts and opinions

plus consideration of all known factors having any bearing upon the objectives of compliance, maintenance of quality education and a peaceful transition. After submission of the Plan, defendants undertook a major effort to be prepared to thoroughly and exhaustively explain and support the design and structure of the Chattanooga Plan of Desegregation at the hearing set for January 23, 1961.

1961

The District Court decided that a hearing was not necessary and tentatively rejected the Chattanooga Plan of Desegregation as submitted. An appeal was taken from this action by defendants on the ground that such action reflected a misunderstanding of the essence of the Second Brown Decision, frequently referred to as the implementation decision. The Board's reasoning was as follows: The Supreme Court had clearly –

1. recognized the paramount importance of public education;
2. placed a primary responsibility upon local school boards;
3. required school boards to discharge such responsibility in good faith, and
4. directed District Courts to consider whether or not good faith was present.

From this it must be the law that a finding of fact as to good faith or bad faith cannot be avoided. An exercise of judgment was required by seven individuals acting jointly, and good faith was the key to such judgment. In circumstances where deep seated feelings created harsh conflict, good faith was the deciding factor and a factor that should not be assumed, nor avoided, in fairness and justice to all concerned.

It is impossible to arrive at a finding of fact as to good faith unless the District judge hears the body, whose good faith is in question, explain why they did what they did – the facts, the opinions, the experiences, the values, the objectives, the reasons, the emotions. Without such proof a finding

of fact upon the presence or absence of good faith is without foundation and substance.

While the two appeals were pending before the Court of Appeals for the Sixth Circuit, defendants followed the steps outlined in the December 20 Desegregation Plan. Funds were secured for the house to house school census. Census takers were employed and trained. The census was taken and then the facts were transferred to the IBM machine accounting system. Single school zones were established based upon this information and other factors. PTA executive committees were met with in key areas in order to keep these leaders fully advised. Later meetings were held with each of the PTA groups of twenty white elementary schools wherein a status report was given by the superintendent or one of his assistants.

With this background the Board then proceeded to select the elementary schools to be desegregated, selecting nine white elementary schools affecting 84 Negro children in the first three grades and seven Negro schools affecting 189 white children. Notices of intent were requested for the sole purpose of providing the school officials with the information as to which classrooms would be desegregated. This was a necessary requisite to pinpoint the school communities and classrooms for which adequate desegregation preparation must be designed and effected. Such preparation was planned and commenced.

This course of action was required because the December 20 Plan was the ultimate as to the defendants best judgment, therefore action consistent with the plan was dictated by moral and legal considerations.

At this stage of the proceedings the defendants present position and judgment was that:

1. Peaceful desegregation is of paramount importance; therefore, the Board should submit and support a Desegregation Plan that has the maximum probability of resulting in peaceful desegregation, consistent with philosophy expressed in Supreme Court's decisions in the Brown Cases.

2. A peaceful desegregation process is a requisite for maintenance of quality educational program both in the near future and over a long period of time.

3. While the law requires only the system be desegregated, the maintenance of quality education requires that desegregated classrooms be integrated insofar as is possible for education occurs only where good classroom environment exists free of tension and conflict.

4. School communities vary in their degree of readiness to accept and support a measure of desegregation.

5. Preparation of overall community for peaceful desegregation, compliance with law, active support of law and order, are essential to peaceful desegregation and directly related to maintenance of quality education.

6. Preparation of school communities on individual basis has similar status.

7. Preparation of individual classrooms to be desegregated is required.

8. Preparation of school personnel is necessary.

9. All such preparation requires time and has no bearing on delay for sake of delay.

10. Rights of Negro children will be of little validity without classroom integration.

11. Gradualism as a procedure for compliance is called for by the Supreme Court, Appellate Courts and acquiesced in, inferentially by many policy decisions of N.A.A.C.P. Gradualism is the law.

Why is peaceful desegregation of such paramount importance. A demonstration of peaceful desegregation will remove uncertainties and emotionalism associated with the human fear of the unknown and the untried. It will give the community confidence in itself and its capacity to solve its own problems. It will avoid the scars that inevitably flow from turmoil and conflict. It will engender confidence in the maturity of public education with future benefits of importance.

Community preparation for desegregation was a long-term goal and effort of defendants. Since the summer of 1961,

responsible leadership came forward on a voluntary basis. A citizens steering committee was formed. The Mayor of Chattanooga, P. R. Olgiati, and the Judge of Hamilton County, Chester Frost, appointed the chairman. It represented a voluntary acceptance of responsibility by top community leadership. The preliminary planning was done. Committee responsibility was assigned and accepted. The approach was to the total community. Broad community participation was planned and partially implemented. The goal of this committee was the maintenance of law and order in the desegregation process.

1962

The superintendent and his staff completed the plans for the preparation of school personnel. A principals meeting was held January 3, 1962, to outline the detailed program of future preparation of principals, teachers, students and parents.

With regard to school community preparation substantial progress was made, including meetings by the superintendent with student leaders from selected schools involving assistant superintendents, principals and guidance personnel. Further meetings were had with P.T.A. leaders, homeroom mothers, white and Negro parents of children in classrooms affected in order to encourage acceptance of responsibilty in each school and classroom.

THE 1962 HEARING

A hearing was held on February 1 and 2, 1962 after which the District Court approved the desegregation plan in part. Said plan involved the desegregation of sixteen selected elementary schools in September of 1962 in grades 1, 2, and 3, followed by desegregation of all four grades of all elementary schools in September 1963 and the remaining elementary grades in 1964. The plan proposed to desegregate the first year of junior high in 1965, the remaining junor high grades in 1966, first year senior high in 1967, the remaining high

school grades in 1968 and the Chattanooga Technical Institute in 1969. "All parties appeared to find this broad scheme of desegregation acceptable." An appeal was taken by both parties with reference to specific portions of the District Court's orders and decrees with reference to transfer policy and the interim unavailability of certain special courses to Negroes. Such plan was approved upon appeal with the exception of technical and vocational courses and the case was remanded for further proceedngs with respect to them.

Under date March 29, 1965, the plaintiffs filed a Motion for Further Relief seekng acceleration of desegregation so that complete desegregation would be effected by September 1965 and for teacher and pupil assignments to be made *"wthout regard to race"* and that all racial classifications be eliminated from the operation of the public school system. The District Court granted the relief requested requiring the complete elimination of dual zones in all grades by September 1966. The Court denied relief on the issue concerning the faculty desegregation. The Court of Appeals, 373 F.2d 75 (2/27/67), affirmed the judgment of the District Court with the exception of the issue of faculty assignments as *Bradley* v. *School Board of City of Richmond*, 382 U.S. 103 (1965) having been decided since the District Court decision was filed.

PROCEEDINGS SINCE 2/27/1967 DECISION OF APPELLATE COURT

On March 29, 1967 the District Court entered an order finding that the single question left for decision was faculty assignment. On September 12, 1967 the defendant proposed an offer of judgment regarding the faculty issue. Such was neither accepted nor specifically rejected by plaintiffs, and on December 31, 1968, an additional Motion for Further Relief was filed. Then again on November 14, 1969 another Motion for Further Relief was filed. On November 23, 1970 plantiffs filed a Motion For Summary Judgment contending that the desegregation plan had proven ineffective to accom-

plish its purpose, that is the establishment of a unitary school system in the City of Chattanooga, such motion apparently being based upon *Green* v. *School Board of New Kent County*, 391 U.S. 430, 437-8 (1968) which charged de jure school boards with "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."

The District Court denied the Motion for Summary Judgmen (2/19/71) but set the case for evidentiary hearing and specified the issues for trial placing the burden of proof upon the Board to show that its actions met the obligation to establish a unitary school system.

As invited by the District Court, the Board responded:

> "If the affirmative duty referred to by the Supreme Court does encompass affirmative decisions by the Board based solely upon race, and coupled with compulsion by the Board in order to increase the number of whites in all-black high schools and the number of blacks in formerly all-white high schools, then defendant Board would not have met its affirmative responsibility to establish a unitary school system when this concept is so interpreted as to require a recognition of race." (3/8/71) Appendix in Sixth Circuit Nos. 71-2006, -2007, p. 87.

1971 EVIDENTIARY HEARINGS

The evidentiary hearing was held on April 14, 1971, May 11-19, 1971 inclusive. Following this hearing the District Court Judge found that defendant had not complied with the constitutional responsibility to establish a unitary school system and ordered a new plan of desegregation to "maximize integration" to be submitted. On June 16, 1971 said plan was filed incorporating racial gerrymandering of zones and the assignment (and transportation) of students, faculty and supervisory personnel upon the basis of race in order to increase both student and faculty desegregation. A hearing was held on July 16, 1971 on the acceptability of the Board's amended plan along with the plaintiffs' objections thereto.

On July 26, 1971 the Court approved all substantive portions of defendant's amended plan, 329 F. Supp. 1374, except the high school portion and ordered the plan implemented to the extent possible by September 1971. The plaintiffs appealed objecting to the inadequate degree of student desegregation (racial imbalance) to be accomplished by the plan as approved. Objections centered on those elementary schools where the racial proportion would be less than thirty percent of either black children or white children. The schools included were Barger, 20% black, Carpenter, 14% white; Long, 16% black; Rivermont, 12% black; Sunnyside, 15% black. The District Court had this to say:

> "With regard to the five elementary schools that will retain racial ratios of less than 30% or more than 70% of one race, the Court is of the opinion that the Board has carried the burden of establishing that their racial composition is not the result of any present or past discrimination upon the part of the Board or other state agency. Rather, such result is the consequence of demographic and other factors not within any reasonable responsibility of the Board." 329 F. Supp. (p. 1382).

As was found by the District Court, all of the remaining twenty-seven elementary schools under the plan "will have racial ratios of not less than 30% nor more than 70% of any race in each school." (p. 1383).

The Court went on to say:

> "To the extent that any student racial imbalance exists in any of the elementary schools, the Court is of the opinion that the Board has carried the burden of establishing that such racial imbalance as may remain is not the result of any present or past discrimination upon the part of the Board or other state agency. Rather, such limited racial imbalance as may remain is the consequence of demographical, residential, or other factors which in no reasonable sense could be attributed to School Board action or inaction, past or present, nor to that of any other state agency." (p. 1383).

The treatment of the junior high schools was substantially in the same manner as that of the elementary schools. Only Hardy, 27% white; Dalewood, 29% black and Long, 15% black deviated from the 30-70 percent ratio. At page 1384 the Court said:

> "In the light of all the record, the Court is of the opinion that the junior high school plan as submitted by the defendants removes all state created or state imposed segregation. To the extent that any student racial imbalance exists in any of the junior high schools, the Board has carried the burden of establishing that such racial imbalance as remains is not the result of any present or past discrimination upon the part of the Board or upon the part of other state agencies. Rather, such limited racial imbalance as may remain is the consequence of demographical, residential, or other factors which in no reasonable sense could be attributed to School Board action or inaction, past or present, nor to that of any other state agency. The Court is accordingly of the opinion that the defendants' plan for desegregation of the Chattanooga Junior High Schools would eliminate 'all vestiges of state imposed segregation' as required by the *Swann* decision."

As to the high schools, zoning was introduced for the first time in the Chattanooga system in order to achieve greater student desegregation with the plan proposing to make Brainerd High School 32 percent black, 68 percent white and Chattanooga High 44 percent black and 56 percent white with the formerly all-black high schools, Howard and Riverside, being 75 percent black, 25 percent white. The Court was concerned as to whether the students and the statistical data upon which the defendant's plan was based would correspond with actual experience. Thus the Court gave tentative approval only to the desegregation plan at the high school level.

The plan proposed limited transportation for elementary and junior high school students because of pairing, clustering,

and racial assignment of students. With reference to transportation the Court's decision stated as follows:

> "The defendants will accordingly be permitted to implement such portions of its elementary and junior high school plans as may be feasible with the transportation facilities reasonably available to it at the commencement of the September term of school, and will be permitted to delay the implementation of any remaining portions of the said student assignment plans in the elementary and/or junior high school until the transportation facilities necessary therefor can be acquired in the prompt but orderly process of school administration and of local governmental affairs, and until such facilities can be placed in use with safety and with a minimum interruption of the educational program. As soon as the defendants can formalize their plans in this regard, and in no event later than within thirty days, the defendant will advise the court of their proposed implementation schedule in accordance with the foregoing." (p. 1388).

By order of August 5, 1971 the District Court permitted delay as to transportation "until the transportation facilities necessary therefor can be acquired in the prompt but orderly process of school administration and of local governmental affairs, . . ." (Appendix in Sixth Circuit Nos. 71-2006, 2007, Vol. I, p. 215).

PROCEEDINGS IN 1972

A proceeding in state court resulted in an injunction against the Commission of the City of Chattanooga from providing any public funds to transport school students for the purpose of achieving racial balance. On January 24, 1972 defendant filed a "Status Report on Amended Plan of Desegregation and Motion for Further Instructions" bringing the state court decision and injunction to the attention of the Federal District Court. Further proceedings were had at the District Court level as a result, but such proceedings are not germane to the

present appeal, except that in the District Court Opinion filed on February 4, 1972, the District Court, 341 F. Supp. 193, 200, directed that its Order of August 5, 1971 be fully implemented no later than the fall term of school in 1972, unless otherwise stated in the United States Court of Appeals.

On May 18, 1972 defendant filed a report as required by the Opinion of February 4, 1972 with reference to "any racial imbalance remaining in the four general purpose high schools." The report referred to a statiscal report entitled "Tenth Day of School Enrollment Report 1971-72 School Term" dated September 23, 1971 and filed with the Court on September 24, 1971 coupled with a supplementary statistical analysis dated March 17, 1972, and entitled "Summary Analysis of Senior High Schools 1971-72 Enrollment of 1970-71 Pupils Projected to Enroll."

Oral argument before this Court in Nos. 71-2006, 2007 took place on June 5, 1972.

Defendant filed a Motion for a Limited Stay on June 23, 1972 pursuant to Section 803 "Provision Relating to Court Appeals, Title 8 — General Provisions Relating to the Assignment of Transportation of Students" of Education Amendments of 1972 as passed by the Senate on May 24, 1972, the House of Representatives on June 8, 1972, and as signed by the President of the United States on June 23, 1972. Following several delays requested by the attorney for the plaintiffs, a hearing was held on said motion and other pending motions on July 27, 1972. Lengthy briefs were filed by the parties and on August 11, 1972, the District Court granted defendant's Motion to Stay, but limited to "only of such portions of the previous orders of this Court as necessarily involve the transportation of elementary or junior high school students, such stay being subject to the further orders of this Court." Plaintiffs filed Notice of Appeal from said order on August 17, 1972.

A report entitled "Submission of Student Desegregation Statistics by Defendant as of the Tenth Day of School, 1972-73, U. S. Department of Health, Education, and Welfare School

System Summary Report" and explanatory material was filed with the District Court under date December 4, 1972 containing the statistical facts evidencing the response of students to the desegregation plans in the second year of partial implementation.

On December 14, 1972 oral argument took place before this Court in Cincinnati sitting en banc.

PROCEEDINGS IN 1973

Oral arguments before the Supreme Court of the United States in the Richmond case (*Bradley, supra*) took place on April 23, 1973 and this Court's en banc decision affirming the District Court was filed on April 30, 1973. The following appeared in said decision:

> "The Board of Education has filed a supplemental record in this court containing statistics said to reflect changes which have occurred after the decisions of the District Court. We decline to consider these statistics in the present appeal. Appropriate relief required by changed conditions is a matter for presentation to and consideration by the District Court. We re-emphasize the holding of this Court in *Kelley* v. *Metropolitan Board of Education* of *Nashville* and *Davidson County, supra*:
>
> > 'Like most decrees in equity, an injunctive decree in a school desegregation case is always subject to modification on the basis of changed circumstances.'"
> > 463 F. 2d at 745-46.

Under date May 31, 1973, counsel for defendant submitted an opinion in letter form to defendant entitled "Suggested Procedure for Board Analysis of Proposed Amendments to Plan of Desegregation and Educational Reasons Therefor." (Tr. 828, Exhibit 18) The defendant was reminded that in *Brown II* "the primary responsibility for elucidating, assessing, and solving these problems" was clearly placed upon school authorities, the clear implication being that initiation of solutions was the responsibility of school authorities and not the

District Court. The thrust of the opinion was to advise defendant as to the steps needed to be taken if the Board was to meet its constitutional obligation under *Brown I* and *II* in seeking to find a workable solution to compensate for the dual school systems operated prior to September of 1963-66 in Chattanooga.

The above recommendation by counsel was considered at a meeting of the Chattanooga Board of Education on June 13, 1973 and the unanimous decision was made to accept said recommendation. Subsequent board meetings were held on June 19, 1973, June 26, 1973, July 3, 1973, July 9, 1973 and July 11, 1973 on which date the proposed adjustments to the June 16, 1971 plan of desegregation were unanimously agreed upon for presentation to the District Court. There followed a letter to Avon N. Williams, legal counsel for plaintiffs, requesting a conference in order for defendant to present the proposed adjustments and their supporting rationale in an informal conference. On July 20, 1973, the Motion for Further Relief: To Adjust Amended Plan of Desegregation as Filed June 16, 1971, and Brief in Support of Said Motion for Further Relief was filed. Pursuant to motion filed by plaintiffs, an order was entered on July 30, 1973 extending time for plaintiffs to answer defendant Board's motion to adjust plan to August 10, 1973. On August 14, 1973 a conference with counsel present was held with the District Court in chambers. By order dated August 16, 1973, an evidentiary hearing was set for September 10, 1973. Then on August 22, 1973 a motion to postpone hearing was filed by the plaintiffs which was granted and an order entered on August 28, 1973 setting a date for the hearing on October 1. The rehearing was reset for October 2, 1973 on September 14, 1973. The evidentiary hearing was held on October 2, 3, 4, 5, 9, 10 and 11 and thereafter defendant filed a memorandum in support of its motion on October 17 and a supplemental brief on October 26. A Memorandum Opinion denying defendant's motion was filed on November 16, 1973 followed by final order on December 18, 1973.

Plaintiffs filed its motion to amend Memorandum Opinion of November 16, 1973 on December 26, 1973 and for new trial and for further relief. Thereafter on January 7, 1974 said motion was supplanted by an amended motion to amend for a new trial and further relief.

While the above events were taking place at the district court level, CBE had filed a Petition for Writ of Certiorari with this Court, said case being docketed on July 25, 1973. Such petition was from the en banc affirmance by the Court of Appeals for the Sixth Circuit entered on April 30, 1973. 477 F.2d 851 (1973). Certiorari was denied by this Court on November 12, 1973, 414 U.S. 1022.

PROCEEDINGS IN 1974

On June 20, 1974, Judge Wilson filed a Memorandum on Pending Motions finding that plaintiffs' Motion and Amended Motion for a New Trial or for Further Relief of January 7, 1974 was without merit and should be denied. On July 12, 1974 the plaintiffs' notice of appeal (No. 74-2100) from Judge Wilson's denial of the Motion as set forth above was filed. On July 22, 1974 CBE's notice of appeal (No. 74-2101) from the order of December 18, 1973 was filed. The appellate oral argument was on April 18, 1975 with the opinion being rendered on October 20, 1975. The plaintiffs' "Motion for Rehearing or Rehearing En Banc" was filed on November 4, 1975 with an "Amended Petition for Rehearing and Suggestion of Rehearing En Banc" being filed on November 24, 1975 pursuant to a grant of extension of time in which to file having been noted on November 4, 1975.

Plaintiffs' petition for a rehearing in No. 74-2100 called the attention of the court of appeals to the fact that this Court had granted Certiorari on November 11, 1975 in *Pasadena City Board of Education, et al.* v. *Spangler, et al. and United States,* No. 75-164, going on to request a delay in action upon such petition to rehear until *Pasadena,* supra, was decided.

SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
APR 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1564

JAMES JONATHAN MAPP, et al.,

Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JACK GREENBERG
JAMES M. NABRIT, III
DREW S. DAYS, III
10 Columbus Circle
New York, New York 10019

AVON N. WILLIAMS, Jr.
1414 Parkway Towers
404 James Robertson Parkway
Nashville, Tennessee 37219

Attorneys for Petitioners

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THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cause on October 20, 1975 and January 27, 1976.

Opinions Below

The District Court memorandum and order of June 20, 1974 are unreported and are printed in the appendix hereto, App. 1a, 6a. The Court of Appeals opinion of October 20, 1975 is reported at 525 F.2d 169 (6th Cir. 1975) and is printed in the appendix hereto, App. 8a. The Court of Appeals opinion of January 27 denying rehearing and rehearing *en banc* is reported at 527 F.2d 1388 (6th Cir. 1976) and is printed in the appendix hereto. App. 28a.

Jurisdiction

The judgment of the Court of Appeals was entered on October 20, 1975 (App. 8a). On January 27, 1976, the Court of Appeals denied application by petitioners herein for rehearing *en banc* (App. 28a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Question Presented

Were the lower courts correct in finding that a 1971 zoning desegregation plan for high schools in Chattanooga, Tennessee was constitutionally sufficient and required no modification which, in July 1974, left 59% of the black high school student population in two traditionally black facilities where integral portions of that plan for elementary and junior high designed to achieve desegregation at those levels had not been fully implemented at that time, majority-to-minority transfer provisions of the plan had not been implemented for elementary and junior high levels as proposed, the plan for high schools itself had not been fully implemented, and where significant changes had occurred in population and pupil attendance patterns and in the configuration of the system as a result of annexation during the over two-year span between the time the plan was developed and the date it received final district court approval.

Constitutional Provision Involved

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case

History of the Litigation

This action was commenced on April 6, 1960 on behalf of a class of black children and parents seeking an end to state-imposed racial segregation in Chattanooga, Tennessee public schools. Proceedings pertinent to this petition commenced in 1971.[1]

On May 19, 1971 the district court held that the Chattanooga Board of Education (hereinafter Board) had failed to create a unitary system and directed it to develop a plan to be implemented by September, 1971. On July 26, 1971, the court approved, with certain minor revisions, the Board's Amended Desegregation Plan for elementary and junior high schools; it withheld final approval, however, of the high school plan pending receipt of data on capacity of four academic curriculum high schools and directed the Board to implement the proposed high school plan as an interim measure in September, 1971. 329 F.Supp. 1374 (E.D. Tenn. 1971). Shortly thereafter, the court granted the Board permission to delay implementation of those portions of elementary and junior high plans which could not be effectuated until additional transportation facilities were acquired.

On February 4, 1972 the district court gave final approval to the Board's plan to establish a system-wide vocational-technical high school, but withheld such approval with respect to the zoning proposal for the other four high schools, directing officials to report by June 15, 1972 on whether

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[1] The history of petitioners' efforts to achieve a unitary system in Chattanooga between 1960 and 1967 is recounted in: 295 F.2d 617 (6th Cir. 1961); 203 F.Supp. 843 (E.D. Tenn. 1962), *aff'd* 319 F.2d 571 (6th Cir. 1963); 373 F.2d 75 (6th Cir. 1967); and 274 F.Supp. 455 (E.D. Tenn. 1967).

further desegregation was required at that level. It ordered that elementary and junior high school desegregation be implemented fully not later than fall, 1972. Appeals were taken with respect to district court judgments entered between July, 1971 and February, 1972 which were affirmed *en banc* on April 30, 1973. 477 F.2d 851 (6th Cir. 1973). Certiorari was denied by this Court on November 12, 1973. 414 U.S. 1022 (1973).

On July 20, 1973, the Board moved for further relief seeking an adjustment of the 1971 desegregation plan approved by the trial court on July 26, 1971, as amended by subsequent orders. The Board's motion was denied by the district court on November 16, 1973, which ordered that complete implementation of the 1971 plan be accomplished no later than by the beginning of the January, 1974 semester. The court also gave its final approval at that time to the Board's 1971 plan for high school desegregation. 366 F.Supp. 1257 (E.D. Tenn. 1973).

On December 24, 1973, petitioners filed a motion to amend the November 16, 1973 opinion and for a new trial and/or further relief. The motion sought an order requiring the Board to develop a new desegregation plan rather than to implement fully the 1971 proposal. By memorandum and order of June 20, 1974, the district court denied petitioners' December 24, 1973 motion.

The Board appealed from the order of November 16, 1973 denying its motion to amend the desegregation plan, which it asserted became final upon the denying on June 20, 1974 of petitioners' motion to amend and for a new trial or further relief. Petitioners appealed directly from the June 20, 1974 denial of their motion by the district court.

On October 20, 1975, the Court of Appeals for the Sixth Circuit affirmed the trial court's rulings. (App. 8a) Re-

hearing and rehearing *en banc* were denied by that court on January 27, 1976 (App. 28a). The Board filed a petition for a writ of certiorari from this Court on January 29, 1976, which has not been acted upon as of this date. *Board of Education of the City of Chattanooga* v. *Mapp*, No. 75-1077, O.T. 1975 (44 U.S.L.W. 3445).

History of Desegregation in Chattanooga

In 1962, the trial court approved an eight-year plan of desegregation involving gradual conversion from dual geographic zones to unitary zones for elementary and junior high grades and continued use of freedom of choice on the high school level, extending that choice to black students for the first time in 1967. During the 1962-63 academic year eighteen (18) all-black schools were maintained—one senior high, three junior high and fourteen elementary schools.

Though implementation of this plan was accelerated in August, 1965 by the Court to ensure its completion by September, 1965, a number of all-black or virtually all-black schools were still in operation. Twelve (12) elementary schools were between 96-100% black; four (4) junior highs were 99-100% black; and two (2) senior highs were 99 and 100% black respectively. The all-black elementaries enrolled 82% of the system-wide black elementary population; the all-black junior highs enrolled 73.5% of the system-wide total; and the all-black highs enrolled 83.9% of the system-wide total of black students at that grade level. At that time the racial ratio for the entire system was 48.8% black and 51.2% white.

On May 19, 1971, the district court found that previous plans had not succeeded in accomplishing a unitary system and directed the Board to submit further plans for the final accomplishment of a unitary school system in Chatta-

nooga. The Board's plan proposed to accomplish a ratio of not less than 30% nor more than 70% of any race in most elementary and junior high schools in the system through techniques of pairing, clustering, rezoning and majority-to-minority transfers. Seven schools were to be closed.

Insofar as high schools were concerned, the Board proposed to retain the five facilities then in use. Four schools —two all-black (Howard and Riverside) and two majority white schools (Brainerd and Chattanooga)—would be rezoned and utilized solely for academic programs. Zones for these schools would be drawn to ensure that the newly-created junior high zones fed into them. Kirkman, which offered only technical and vocational training, would be left unzoned; vocational-technical programs at Howard and Riverside, the two black schools, would be transferred to Kirkman. As a result, changes in the racial compositions at the high schools would be as follows:

	1970-71		*Proposed (1971 Plan)*	
	% B	*% W*	*% B*	*% W*
Brainerd	14	85	32	68
Chattanooga	10	90	44	56
Howard	100	0	70	30
Riverside	99	1	68	32
Kirkman	11	89	45	55

The Board's projections for the high schools were dependent in large part upon the extent to which proposals for elementary and junior high facilities were realized. Additionally, the plan contained a majority-to-minority transfer provision like that approved by this Court in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 26-27 (1971).

On July 26, 1971, the district court approved the Board's proposals for desegregation of elementary and junior high

grades but granted only tentative approval to the high school plan. Though it permitted the high school plan to be implemented on an interim basis in September, 1971, the Court directed the Board to provide it with additional information on capacities of the facilities involved and on the extent to which non-resident tuition students, from surrounding Hamilton County and elsewhere, were enrolled in Chattanooga high schools.

In September, 1971, most of the Board's desegregation proposals for desegregation of the elementary and junior highs, including majority-to-minority transfers, were not implemented. New zones were established for the four academic high schools and one vocational-technical high was opened on a system-wide basis. A number of vocational-technical courses continued to be offered, however, at the two traditionally all-black high schools. Since the plan was not implemented in any meaningful sense in September, 1971, the Chattanooga school system at that time had ten 99-100% black elementaries and four 99-100% black junior highs. Racial ratios at the high schools in September, 1971 as compared to those projected in the plan were as follows, excluding students still assigned to vocational-technical courses in the two black highs:

	% B Projected	*% B Actual*
Kirkman	45	25
Brainerd	32	33
Chattanooga	44	33
Howard	70	96
Riverside	68	97

No implementation of elementary provisions of the Board's 1971 plan had occurred by the start of the 1972-73 academic year. As of October 9, 1972, the Chattanooga system had five (5) all-black elementaries and five (5)

others with black ratios between 92 and 99.7%; 69% of all black elementary students in the system were enrolled in these ten schools. There were two all-black junior high schools and two (2) others with 99.7% black enrollments; these four schools enrolled 63% of the entire black junior high population. At that time blacks constituted 56% of the total elementary school population and 58% of the total junior high school population in Chattanooga. At the high school level, the black ratios at the five high schools, as compared to those in September, 1971 were as follows:

	% B—9/23/71	*% B—10/9/72*
Kirkman	25	36
Brainerd	33	45
Chattanooga ...	33	45
Howard	96	95
Riverside	97	95

At that juncture, blacks comprised 59% of Chattanooga's total high school population. Of this total, 59% were enrolled in Howard and Riverside.

On July 20, 1973, the Board moved the district court to permit it to modify its 1971 desegregation plan "because of changed circumstances since said Amended Plan was designed and judicially approved" and for an evidentiary hearing in order to support its claims to a need for modification. Generally, the avowed purpose of the Board's proposed modifications was to achieve "a viable racial mix" in as many schools in the system as possible. As defined by the Board, "a viable racial mix" was having 20 to 40 percent black students and 80 to 60 percent white students in a school within the system, even though the black-white ratio at that time was 59% to 41%. The district court rejected the Board's proposed modification by opinion of November 16, 1973 and order of December 18,

1973. It remarked as follows with respect to the Board's proposal:

> Contending that their experience indicates that schools having more than 35% black student enrollment tend to lose their white student enrollment rather rapidly, the substance of the defendants' proposed plan is to be accomplished by increasing the number of all-black schools or substantially all-black schools. 366 F.Supp. 1257, at 1259.

The Court stated that annexation, not modification of the plan, was the means by which resegregation could be forestalled. In this regard, it observed that the following year "as a consequence of recent annexations, the Chattanooga Public Schools will have an all-time high student enrollment as well as again having a majority of white students." *Id.*, at 1260. In rejecting the Board's proposal, the court stated:

> Furthermore, to maintain its white majority schools, as an inducement for white students not to voluntarily withdraw, it would require year by year adjustment of the plan, presumably *ad infinitum*. Under such a plan, it would appear that the possibility of achieving a unitary school system could never occur until all demographic change ceased, an unlikely event in an urban society where for years the affluence of the City of Chattanooga, like other cities, has been constantly receding to the suburbs. *Ibid.*

The court did, however, grant final approval to the 1971 proposals for desegregation of the high schools, finding that the continued one-race character of Howard and Riverside was the result of conditions beyond the control and responsibility of the Board. It also approved the Board's proposal to assign students from the newly-

annexed areas to over 80% white facilities.[2] And, though no request for such a ruling was made by the parties, the court authorized the Board to effect zone changes "at any time" which were merely administrative, did not increase majority race ratios in any school or involved any annexed areas. Full implementation of the Board's desegregation plan, approved initially in July 1971, was ordered by the court by no later than the commencement of the midyear 1973-1974 school semester.

On December 24, 1973, petitioners filed a motion "to amend the opinion of November 16, 1973 and order filed December 18, 1973 and for a new trial and/or further relief." This motion was itself amended on January 7, 1974. In seeking a new trial and further relief, petitioners contended that the district court erred in ordering implementation of the 1971 plan by the second semester of the 1973-74 academic year. During the over two years between 1971 and 1973 when implementation of most of the plan's provisions for elementary and junior high school desegregation was held in abeyance, significant changes had occurred in the racial composition and configuration of the system that, it was argued, dictated the developing of a totally new desegregation proposal. And the fact that areas of Hamilton County were annexed while full implementation of the 1971 plan was temporarily suspended required, petitioners contended, that any new desegregation plan be drawn with the objective of utilizing these annexed areas to maximize desegregation.

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[2] Between 1971 and 1973, two heavily-white areas were taken into the city from Hamilton County, for many years the source of non-resident tuition students in Chattanooga public schools. For example, during the 1970-71 school year, a total of 620 such students from Hamilton County were enrolled in the five Chattanooga high schools. One area encompassed an existing county school building, a 96% white elementary, and one did not. In total, these areas brought approximately 480 white and 31 black students into the Chattanooga public schools.

On June 20, the district court denied petitioners' motion, as amended, for a new trial and further relief in the following language:

> Turning next to the plaintiff's motion and amended motion for a new trial or for further relief, the Court is of the opinion that the motions are without merit and should be denied. The provisions of the judgment of this Court entered upon August 5, 1971, pursuant to the opinion of the Court set forth at 329 F.Supp. 1374 and affirmed upon appeal at 477 F.2d 851, together with the provisions of the judgment entered upon December 18, 1973, pursuant to the opinion of this Court set forth at 366 F.Supp. 1257 are believed to be sufficient to provide for any necessary or appropriate further supervision by this Court in this case. (App. 4a).

The Court of Appeals' Decisions of October 20, 1975 and January 27, 1976

On October 20, 1975, the Court of Appeals for the Sixth Circuit affirmed by a vote of 2-1 the trial court's orders of December 18, 1973 (denying the Board's motion to modify the 1971 plan) and of June 20, 1974 (denying petitioners' motion for a new trial or further relief). To the extent that the Board or petitioners were asserting that the trial court erred in rejecting their suggestions that the 1971 desegregation plan be revised totally, the majority ruled that such matters had already been resolved by its *en banc* decision in April, 1973 which gave full approval to that plan except insofar as the high schools were concerned. It concluded, therefore, that the sole remaining issue was whether the trial judge erred in giving final approval to the desegregation plan for high schools, only tentatively approved since July, 1971. On that is-

sue, the majority held that the trial court's determination that the continued one-race character of Howard and Riverside Highs "was due to a substantial departure of white students from the public schools in Chattanooga," "beyond control and responsibility of the School Board" was not clearly erroneous (App. 12a). Its conclusion in this regard was articulated as follows:

> Having implemented the plan for desegregating the high schools by establishing zones for attendance which were designed to achieve a high degree of racial balance throughout the system, and having provided further for continuance of a majority-to-minority transfer policy the district judge conceived that he had obeyed the mandate of Brown v. Board [citation omitted] and Swann v. Charlotte-Mecklenburg Board of Education [citation omitted]. So do we. (App. 14a)

In dissent, Judge Edwards rejected the conclusions reached by the majority with respect to the constitutionality of the high school plan in the following terms:

> With all respect for the sincerity of my colleagues, I cannot join the majority opinion, or approve its result. If the majority opinion prevails in this court and in the Supreme Court, it will establish as law the proposition that approximately 60% of the black children in the high schools of the Chattanooga public school system may be continued forever in complete racial segregation in all black schools which were built as such under state law which required a racially dual system and which have been continuously segregated as such down to this very moment. I cannot square this proposition with the great command of the Fourteenth Amendment to provide all American citizens "the equal protection of the laws." (App. 15a).

Judge Edwards observed that the Board's strongest argument for the constitutionality of the high school plan was that 25% white students had been zoned into Howard and Riverside but that white students avoided going by resorting to "white flight". To this assertion he responded as follows:

> As to this measure we have no findings of fact concerning [the Board's] contention. But if we assumed their truth, we clearly would not have exhausted the possibilities for successful desegregation nor satisfied the constitutional command. Many possibilities for desegregation remain, including pairing of white and black schools and high school construction which would make desegregated zones more feasible. In any instance, the defendant school board should be required to propose a new and realistic plan to meet its constitutional duty. (App. 27a)

On January 27, 1976, the Court of Appeals denied petitioners' request that the case be reheard or reheard *en banc*, Judges Edwards and McCree dissenting. Judge Edwards wrote that "there can be no doubt that the two black high schools are racially separate public schools established and maintained by state action and that as to these, there has been no desegregation at all." (App. 29a)

REASONS FOR GRANTING THE WRIT

The Decisions of the Courts Below, Approving Full Implementation of a Desegregation Plan Two Years After It Was Developed Despite Changes In the Racial Composition and Configuration of the School District That Rendered Obsolete Projections That Dismantling of the Dual System Would Occur, Were Premised Upon An Erroneous Reading of This Court's *Swann* Opinion Which Should Not Be Allowed to Stand.

Demographic changes occurring in formerly dual systems between 1954 and 1971 do not lessen the constitutional duty of school boards to act affirmatively to eradicate the vestiges of state-imposed segregation. *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1971) stated in this regard:

> The problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts. The failure of local authorities to meet their constitutional obligations aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems. This process has been rendered more difficult by changes since 1954 in the structure and patterns of communities, the growth of student population, movement of families, and other changes, some of which had marked impact on school planning, sometimes neutralizing or negating remedial action before it was fully implemented . . . The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. *Id.*, at 14-15.

Swann teaches, therefore, that the constitutionality of any desegregation plan must be evaluated in light of conditions presently existing in a formerly dual system, not of conditions when *Brown* was decided.

The lower courts acted contrary to this principle in several respects. First, the district court approved implementation in 1974 of a desegregation plan that was developed by the Chattanooga Board in July, 1971 but not effectuated in major respects even as late as the end of the 1972-73 academic year. At the elementary level, the Board's 1971 plan envisioned closing five facilities, pairing sixteen schools, clustering six others and retaining three schools serving grades 1—6. Such an approach, the Board contended, would produce ratios of not less than 30% nor more than 70% of any race in 23 of its 28 elementaries. At junior high level, two schools were to be closed and new zones for the remaining ten would be drawn so that newly restructured elementary school zones would "feed" naturally into them. The Board's proposal for desegregation of the high schools involved establishing four centers—two all-black and two majority white—as zoned academic centers. Zones for these schools would flow naturally from those newly-established for the junior highs. One other high school would serve as an unzoned vocational-technical center, an arrangement that would result in its absorbing numerous vocational-technical courses then being offered in the two black schools. A majority-to-minority transfer provision meeting standards established by this Court in *Swann, supra,* was also included in the Board's proposal.

By the end of the 1972-73 academic year, however, little of the 1971 desegregation plan had advanced beyond the drawingboard. Only four elementaries had been paired, none clustered and one all-black school scheduled for clos-

ing had been kept open. The two junior highs scheduled for closing had been retained. No majority-to-minority transfer provision had been implemented for elementary or junior high students. At high school level, certain vocational-technical courses were still offered at the two black schools which, as in 1971, were virtually all-black. And, though the new zones for the four academic high schools had been established, technically speaking, the resemblance they bore to those described in the 1971 plan was artificial since the new elementary and junior high zones designed to feed into the high school zones had never been established. The system was not constitutionally better at the end of the 1972-73 academic year than in 1971 when the trial court found that the Board had failed to dismantle its dual system. No comprehensive desegregation plan had yet been implemented.

When petitioners suggested in December, 1973 that a new plan was necessary, the trial court should have recognized the fact that it was dealing then with a system that had never taken any meaningful steps to desegregate. Instead, it treated the situation as one in which a terminal desegregation plan which promised to "work realistically" and "work realistically now" had been implemented fully in 1971 but had failed for reasons beyond the control and responsibility of the Board. Therefore, the court reasoned, any attempt on its part to determine whether the 1971 plan offered any reasonable likelihood of achieving the "greatest possible degree of actual desegregation" would require year-by-year adjustments to correct for demographic shifts. That the Board's 1971 projections were based upon data for the system which was obsolete in December, 1973, and the largely-white areas had been annexed by Chattanooga between July, 1971 and December, 1973 (which was not foreseen in 1971) were insufficient

reasons, according to the court, to justify a re-evaluation. In this, the trial court was clearly in error.

Secondly, the court of appeals erred in refusing to consider whether the 1971 plan for elementary and junior highs satisfied constitutional requirements. It stated as follows:

> Both appeals in effect seek to relitigate all of those same issues which we decided in an en banc decision in this Court, reported in *Mapp* v. *Board of Education*, 477 F.2d 851 (6th Cir. 1973), *cert. denied*, 414 U.S. 1022, 94 S.Ct. 445, 38 L.Ed.2d 313 (1973). We there affirmed a final plan of desegregation in all respects except as to the high schools in Chattanooga. (App. 9a)

As with the trial court, the court of appeals' position can be comprehended only by accepting an incorrect premise, i.e., that the 1971 plan for desegregating the elementary and junior high schools had been fully implemented when it was evaluated by the Sixth Circuit in April, 1973. In fact, the plan had not been fully implemented in July, 1973, contrary to the requirements of both *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968) and *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969) that vestiges of dual systems be eradicated "at once". The court of appeals review in early 1973, therefore, could have addressed only the *potential* ability of the 1971 plan to achieve meaningful desegregation at the elementary and junior high levels. In reaching the conclusion that the plan appeared to meet constitutional standards, the court of appeals relied upon fall, 1971 attendance figures and had nothing before it that reflected changes in the racial composition and configuration of the system by April, 1973. Thus, the court of appeals was properly charged with the duty to determine whether the trial court's

decision to order full implementation of the 1971 plan, was constitutionally correct, in the teeth of strong evidence that it would be able to effect no meaningful desegregation in 1974. Had it done so, the court of appeals would have been compelled to find error on the part of the trial court in this regard.

Finally, the court of appeals erred in two respects in considering the constitutionality of the Board's 1971 plan for high school desegregation. It operated on the incorrect assumption that the 1971 provisions had been fully implemented in September, 1971. In fact, vocational-technical courses were still being offered in the two black high schools in June, 1974 when the district court denied petitioners' motion for a new trial or further relief with respect to a new desegregation plan. And it evaluated the high school provisions without giving any consideration whatsoever to the question of how the Board's failure to implement significant portions of its 1971 plan for elementary and junior high schools affected the validity of projections in the plan with respect to the level of desegregation that was to be achieved. The zones and projections for high schools were dependent upon zones for junior highs being properly established, as they, in turn, were dependent upon elementary zones being drawn according to the plan's specifications. Projections of enrollment for the high schools were dependent as well upon the closing of two junior highs; junior high projections were dependent upon the closing of all five elementary schools under the plan. And all projections were linked to the implementation of a majority-to-minority transfer program for students at all levels. Common sense would seem to dictate that when many of the provisions of the plan at the elementary and junior high levels were not implemented as late as 1972-73, Board projections of meaningful high school desegregation lost

all meaning and accuracy. Yet the court of appeals persisted in viewing the high school provisions in a vacuum, as though they could realistically stand irrespective of what had occurred at elementary and junior high levels.

In sum, the lower courts have construed this Court's decision in *Swann, supra,* in a fashion that provides an open invitation for school boards to immunize themselves from effecting any meaningful desegregation by simply developing a plan that appears acceptable on paper while pursuing every tactical advantage to postpone the day when its implementation is actually required. If left uncorrected by this Court, such an interpretation of *Swann* will very likely produce significant erosion of other constitutional standards that have accelerated the desegregation process since 1971.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

Jack Greenberg
James M. Nabrit, III
Drew S. Days, III
10 Columbus Circle
New York, New York 10019

Avon N. Williams, Jr.
1414 Parkway Towers
404 James Robertson Parkway
Nashville, Tennessee 37219

Attorneys for Petitioners

Memorandum of the District Court dated June 20, 1974

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE

SOUTHERN DIVISION

Civil Action No. 3564

JAMES JONATHAN MAPP, et al

—VS.—

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, et al

---

MEMORANDUM ON PENDING MOTIONS

This lawsuit, involving the desegregation of the public schools of Chattanooga, Tennessee, has been in various stages of litigation since 1960. In the course of that litigation many extensive hearings have been held and many opinions, orders, judgments, appeals and affirmations have entered. The history, nature and extent of the previous litigation herein can be obtained by reference to the previous published opinions in the case. *See Mapp* v. *Board of Education of the City of Chattanooga, Tennessee, aff'd,* 295 F.2d 617 (6th Cir. 1961); 203 F.Supp. 843 (1962), *aff'd,* 319 F.2d 571 (6th Cir. 1963); *aff'd,* 373 F.2d 75 (6th Cir. 1967); 274 F.Supp. 455 (1967); 329 F.Supp. 1374 (1971); 341 F.Supp. 193 (1972), *aff'd en banc,* 477 F.2d

851 (6th Cir. 1973), *cert. denied,* —— U.S. ——, 94 S.Ct. 445, 38 L.Ed.2d 313.

In 1973, during the pendency of the last appeal hereinabove referred to, the defendant school board filed a petition seeking modification of the final plan of school desegregation approved by the Court in 1971. Following further extensive hearings upon that petition, this Court entered its opinion upon November 16, 1973, disposing of all pending issues in the case and directing that a final judgment enter. *See* 366 F.Supp. 1261. A final judgment was accordingly entered upon December 18, 1973.

Since the entry of the above referred to final judgment, the following motions have been filed and are now pending in the case: (1) the plaintiff's motion for allowance of counsel and witness fees (Court File No. 4, Tab No. 161); (2) plaintiff's motion to amend judgment or for further relief (Court File No. 4, Tab No. 166); (3) plaintiff's amended motion to amend judgment and for further relief (Court File No. 4, Tab No. 167); (4) defendant's motion to strike (Court File No. 4, Tab No. 168); (5) motion of third parties to intervene (Court File No. 5, Tab No. 1); (6) response and motion to strike motion to intervene (Court File No. 5, Tab No. 2); and (7) third parties' motion to strike (Court File No. 5, Tab No. 3).

Taking up the pending motions in the sequence filed and turning specifically to the plaintiff's motion to be allowed attorney fees and witness expense, it should be noted that in the Emergency School Act of 1972 the Congress enacted the following statute, codified at 20 U.S.C. § 1617:

> Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with

> any provision of this chapter or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

This statute was recently construed by the United States Supreme Court in the case of *Northcross* v. *Board of Education of Memphis,* —— U.S. ——, 37 L.Ed.2d 48, 92 S.Ct. ——. There the Court held that, in a school desegregation case, the statute required that the successful plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." The plaintiff herein having successfully resisted the defendant's efforts to substantially alter the provisions of the final school desegregation plan previously approved by this Court and affirmed upon appeal, 477 F.2d 851, the plaintiff would be entitled to recover of the defendant a reasonable attorney's fee for legal services rendered in behalf of the plaintiff in all proceedings occurring in this court subsequent to the enactment of 20 U.S.C. § 1617; *Johnson* v. *Combs,* 471 F.2d 84 (5th Cir. 1972); *Thompson* v. *School Board of City of Newport News,* 472 F.2d 177 (4th Cir. 1972), and subsequent to the filing of the defendant's motion for further relief upon July 20, 1973. The plaintiff will be allowed 20 days to file a sworn itemized statement regarding his claim for reimbursement of attorney fees for the period of time hereinabove stated. Likewise, the

plaintiff should include within such sworn statement his claim for witness fees or other costs allowed by the law. Upon the filing of such a sworn statement by the plaintiff, the defendant will be allowed ten days to file objections and/or counteraffidavits thereto, whereupon the Court will make its decision upon these matters.

Turning next to the plaintiff's motion and amended motion for a new trial or for further relief, the Court is of the opinion that the motions are without merit and should be denied. The provisions of the judgment of this Court entered upon August 5, 1971, pursuant to the opinion of the Court set forth at 329 F.Supp. 1374 and affirmed upon appeal at 477 F.2d 851, together with the provisions of the judgment entered upon December 18, 1973, pursuant to the opinion of this Court set forth at 366 F.Supp. 1257 are believed to be sufficient to provide for any necessary or appropriate further supervision by this Court in this case.

Finally, there remains to consider the motion by a citizen group designated as the "Concerned Citizens for Neighborhood Schools, Inc." to be allowed to intervene in the lawsuit. The motion to intervene was filed upon January 25, 1974, more than 30 days after the entry of the final judgment of the Court upon December 18, 1973. The relief sought by the intervenors is a full readjudication of the plan for school desegregation. Having considered the motion to intervene, the Court is of the opinion that it should be disallowed. As noted, the motion to intervene comes after almost 14 years of highly publicized and very extensive litigation. Under the circumstances of this case, the motion to intervene is not timely. *See Robinson* v. *Shelby County Board of Education*, 330 F.Supp. 837 (W.D. Tenn. 1971), *aff'd*, 467 F.2d 1187 (6th Cir. 1972); *United States* v. *Carroll County Board of Education*, 427 F.2d 141 (5th

Cir. 1970). *See also* MOORE'S FEDERAL PRACTICE ¶ 2413[1]; WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1916; "The Requirements of Timeliness Under Rule 24 of the Federal Rules of Civil Procedure" 37 VA. L. REV. 563.

Furthermore, there is nothing in the record or history of this litigation that would indicate any inadequate representation of any relevant viewpoint regarding any issue that has heretofore been before the Court. The Court has no present recollection of any issue resolved in this litigation by agreement or compromise. Rather, every issue throughout the long history of the litigation has been reached only after vigorous and extensive litigation followed by judicial decision and appellate review. The motion to intervene will accordingly be denied.

An order will enter on all pending motions in accordance with this Memorandum.

/s/ FRANK W. WILSON
United States District Judge

Order of District Court dated June 20, 1974

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE,

SOUTHERN DIVISION

Civil Action No. 3564

JAMES JONATHAN MAPP, et al.,

—VS.—

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, et al.

ORDER

This case is before the Court upon the following motions: (1) the plaintiff's motion for allowance of counsel and witness fees (Court File No. 4, Tab No. 161); (2) plaintiff's motion to amend judgment or for further relief (Court File No. 4, Tab No. 166); (3) plaintiff's amended motion to amend judgment and for further relief (Court File No. 4, Tab No. 167); (4) defendant's motion to strike (Court File No. 4, Tab No. 168); (5) motion of third parties to intervene (Court File No. 5, Tab No. 1); (6) response and motion to strike motion to intervene (Court File No. 5, Tab No. 2); and (7) third parties' motion to strike (Court File No. 5, Tab No. 3). The following orders are entered upon the foregoing motions in accordance with the memorandum opinion on pending motions filed herein.

Order of District Court dated June 20, 1974

It is accordingly ORDERED;

(1) That the plaintiffs' motion for the awa rd of counsel and witness fees be sustained and that the plaintiff be allowed 20 days within which to file an affida vit itemizing the said fees and costs pursuant to the op inion of the Court entered herein. The defendant will the en be allowed 10 days to file objections or counteraffidavits ;

(2) That the plaintiff's motion and amende d motion for further relief or new trial are denied; and

(3) That the motion of third parties to inte ervene herein is denied.

APPROVED FOR ENTRY.

/s/ FRANK W. WILSON
United States District Judge

ATTEST:

A true copy.

Certified this JUN 20 1974

KARL D. SAULPAW, JR., Clerk

By /s/ BERTHA MORGAN
Deputy

Decision of Court of Appeals dated October 20, 1975

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

(Argued April 18, 1975 Decided October 20, 1975.)

Nos. 74-2100, 74-2101

JAMES JONATHAN MAPP et al.,

Plaintiffs-Appellants,

v.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, et al.,

Defendants-Appellees.

JAMES JONATHAN MAPP et al.,

Plaintiffs-Appellees,

v.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE,

Defendant-Appellant.

BEFORE:

WEICK, EDWARDS and ENGEL,

Circuit Judges.

Decision of Court of Appeals dated October 20, 1975

ENGEL, *Circuit Judge.*

This desegregation case is once more before the court,[1] this time on cross-appeals from an order of the district court entered June 24, 1974. [sic] That order denied motions filed by both parties to modify or amend an earlier order of the court entered December 18, 1973, directed [sic] implementation of the final school desegregation plan previously approved by the court with certain modifications. The December 18, 1973 order provided as well that "[To] the extent the Court has previously given only tentative approval to the High School Zoning Plan, the same is now approved finally."

Both appeals in effect seek to relitigate all of those same issues which we decided in an en banc decision in this court, reported in *Mapp* v. *Board of Education of Chattanooga,* 477 F.2d 851 (6th Cir. 1973), *cert. denied,* 414 U.S. 1022, 94 S.Ct. 445, 38 L.Ed.2d 313 (1973). We there affirmed a final plan of desegregation in all respects except as to the high schools in Chattanooga.

While the district judge had at that time approved the plan as to Kirkman Technical High School, and our affirmance made the same final, District Judge Frank W. Wilson had given only tentative approval to the plan for desegregation for other high schools in the City of Chattanooga, see *Mapp* v. *Board of Education of Chattanooga,* 341 F.Supp. 193 (E.D.Tenn.1972), being uncertain particularly whether three rather than four general purpose high schools would be feasible or desirable in Chattanooga.

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[1] For previous decisions of this court in this litigation see *Mapp* v. *Board of Education of Chattanooga,* 295 F.2d 617 (6th Cir. 1961), 319 F.2d 571 (6th Cir. 1963), 373 F.2d 75 (6th Cir. 1967), 477 F.2d 851 (6th Cir. 1973), *cert. denied* 414 U.S. 1022, 94 S.Ct. 445, 38 L.Ed.2d 313.

Decision of Court of Appeals dated October 20, 1975

With respect to Judge Wilson's refusal to modify the previous final plan of desegregation, we find that he did not abuse his discretion in so doing, particularly since this court has given its approval of that plan.

Accordingly, we see as the sole issue remaining on this appeal the question of whether the district judge erred in ordering final approval of the tentative plan of desegregation for the Chattanooga high schools.

At the time the tentative plan was proposed, it was anticipated that the zoning for the four high schools would produce a racial balance approximately as follows:

	Black Students	White Students
Brainerd High School	32%	68%
Chattanooga High School	44%	56%
Howard High School	75%	25%
Riverside High School	75%	25%

When, however, the plan was placed into effect in the fall of 1971 rather than having the attendance anticipated, the four high schools experienced the following racial balance:

	Black Students	White Students
Brainerd High School	39%	61%
Chattanooga High School	43%	57%
Howard High Schol	99%	1%
Riverside High School	99%	1%

While an actual head count had showed that as late as July 1971 there were 393 (29%) white high school students in the Howard High School zone and 311 (29%) white stu-

dents in the Riverside zone, only ten reported that September to Howard and three to Riverside.

It is the contention of the plaintiffs that a school board's duty in a previously dual and segregated school system cannot be said to have been performed where, after implementation of a plan of desegregation, such an imbalance in the racial mix of the students yet remains. After taking extensive testimony on this issue and on the other issues raised by the parties' motions to amend the earlier judgment, Judge Wilson, in his Memorandum Opinion of November 16, 1973, made the following findings of fact:

> To the extent that the Court has previously given only tentative approval to the high school zoning plan, final approval will now be given that plan. Two high schools, Howard High School and Riverside High School, have not acquired an enrollment of white students as projected by the Board when the plan was proposed in 1971, but rather have remained substantially all black. It was a concern for the accuracy of these projections that caused the Court to initially give only tentative approval to the high school zoning plan. However, subsequent evidence has now demonstrated that changing demographic conditions within the City and other *de facto* conditions beyond the control and responsibility of the School Board, including the voluntary withdrawal of white students from the system, have become the causative factors for the present racial composition of the student body in those schools and not the original action of the Board in creating segregated schools at these locations. It should be recalled in this connection that the plan previously approved included provision for students to elect to transfer from

a school in which they were in a majority to a school in which they would be in a minority.

While the cause of the departure of white students was disputed, there can be little doubt upon the record that the difference between the anticipated mix and the actual attendance of the high schools when the plan was put into effect was due to a substantial departure of white students from the public schools in Chattanooga, a circumstance which the district judge found to have occurred beyond the control and responsibility of the School Board.

No one who firmly believes in the social and educational value of racial balance in a desegregated school system can help being seriously concerned when such a plan for achieving racial balance does not achieve its objectives on implementation. That such a concern was shared by the district judge is manifest throughout the entire record upon appeal. Nevertheless, the district judge concluded that the demographic changes in the city itself were the cause of the remaining imbalance, a finding which finds support in the record and which we hold is not clearly erroneous.

We are satisfied that, in giving final approval to the high school desegregation plan, Judge Wilson was by no means yielding to irrational concerns over white flight which merely masked inherent Board resistance to integration. To the contrary, he carried out the plan in spite of the apprehended result, and beyond that resisted the defendant Board's further efforts to modify the earlier approved plan for the remainder of the system with this language in his November 27, 1973 [sic] opinion:

"The Court is not unsympathetic to the concern expressed by the Board for minimizing the voluntary

departure of white students from the system. It must be apparent, however, that this objective cannot serve as a limiting factor on the constitutional requirement of equal protection of the laws, nor as a justification for retaining *de jure* segregation. Concern over 'white flight', as the phenomenon was often referred to in the record, cannot become the higher value at the expense of rendering equal protection of the laws the lower value. As stated by the United States Supreme Court in the case of *Monroe* v. *Board of Commissioners,* 391 U.S. 450 [88 S.Ct. 1700, 20 L.Ed.2d 733]. . . . :

> 'We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. "But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of the disagreement with them." *Brown II* [*Brown* v. *Board of Education of Topeka II*] [349 U.S. 294] at 300 [75 S.Ct. 753, 99 L.Ed. 1083], . . .

"Moreover, it is the 'effective disestablishment of a dual racially segregated school system' that is required *Wright* v. *Council of City of Emporia,* 407 U.S. 451 [92 S.Ct. 2196, 33 L.Ed.2d 51] . . . not, as seems to be contended by the defendants, the most 'effective' level of voluntarily acceptable 'mixing' of the races." (Footnote omitted)

Having implemented the plan for desegregating the high schools by establishing zones for attendances which were designed to achieve a high degree of racial balance throughout the system, and having provided further for

continuance of a majority-to-minority transfer policy, the district judge conceived that he had obeyed the mandate of *Brown* v. *Board of Education of Topeka II*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (*Brown II*) and more particularly of *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). So do we. Presumably, the district judge might have ordered a further realignment when the first plan did not achieve the proper balance ratio, and yet another if that did not hold. Indeed if such were found to have been required to carry out the constitutional mandate to eliminate the vestiges of a dual system, it would simply have to be done, and we have no doubt the district judge would faithfully have carried out that duty. What he was finally faced with here, however, was rather a more subtle and lingering malaise of fear and bias in the private sector which persisted after curative action had been taken to eliminate the dual system itself. *Swann* v. *Board of Education* recognizes that this latter may be beyond the effective reach of the Equal Protection Clause:

> "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools."
>
> *Swann* v. *Board of Education, supra*, 402 U.S. at 23, 91 S.Ct. at 1279.

Affirmed.

Decision of Court of Appeals dated October 20, 1975

EDWARDS, *Circuit Judge* (dissenting).

This appeal presents just one significant question: Should we now, under applicable Supreme Court precedent, affirm the District Judge's final order of December 18, 1973, approving a final desegregation order applicable to the Chattanooga high schools?

With all respect for the sincerity of my colleagues, I cannot join the majority opinion, or approve its result. If the majority opinion prevails in this court and in the Supreme Court, it will establish as law the proposition that approximately 60% of the black children in the high schools of the Chattanooga public school system may be continued forever in complete racial segregation in all black schools which were built as such under state law which required a racially dual school system and which have been continuously segregated as such down to this very moment. I cannot square this proposition with the great command of the Fourteenth Amendment to provide all American citizens "the equal protection of the laws."

The rule of this case is all the more significant because the smaller numbers, the maturity, and the greater mobility of high school students tend to make practical accomplishment of high school desegregation the least difficult part of the task mandated by *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968) and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

The in banc per curiam opinion of the Sixth Circuit (*Mapp* v. *Board of Education of the City of Chattanooga, Tennessee*, 477 F.2d 851 (6th Cir.), *cert. denied*, 414 U.S. 1022, 94 S.Ct. 445, 38 L.Ed.2d 313 (1973)) constituted

unqualified approval of two previously entered opinions and judgments of Judge Wilson, *Mapp* v. *Board of Education of the City of Chattanooga*, 329 F.Supp. 1374 (E.D. Tenn. 1971); *Mapp* v. *Board of Education of the City of Chattanooga*, 341 F.Supp. 193 (E.D.Tenn. 1972). In these two cases Judge Wilson had approved final desegregation orders concerning the grade schools and junior high schools. Equally clearly, he had not approved any final desegregation plan for the high schools. As to the high schools, in his first opinion he said:

High Schools

> During the school year 1970-71, the Chattanooga School System operated five high schools. These included four general curricula high schools and one technical high school. Kirkman Technical High School offers a specialized curricula in the technical and vocational field and is the only school of its kind in the system. It draws its students from all areas of the City and is open to all students in the City on a wholly nondiscriminatory basis pursuant to prior orders of this Court. Last year Kirkman Technical High School had an enrollment of 1,218 students, of which 129 were black and 1,089 were white. The relatively low enrollment of black students was due in part to the fact that Howard High School and Riverside High School, both of which were all-black high schools last year, offered many of the same technical and vocational courses as were offered at Kirkman. Under the defendants' plan these programs will be concentrated at Kirkman with the result that the enrollment at Kirkman is expected to rise to 1,646 students, with a racial

composition of 45% black students and 55% white students. No issue exists in the case but that Kirkman Technical High School is a specialized school, that it is fully desegregated, and that it is a unitary school.

While some variation in the curricula exists, the remaining four high schools, City High School, Brainerd High School, Howard High School, and Riverside High School, each offer a similar general high school curriculum. At the time when a dual school system was operated by the School Board, City High School and Brainerd High School were operated as white schools and Howard High School and Riverside High School were operated as black schools. At that time the black high schools were zoned, but the white high schools were not. When the dual school system was abolished by order of the Court in 1962, the defendants proposed and the Court approved a freedom of choice plan with regard to the high schools. The plan accomplished some desegregation of the former white high schools, with City having 141 black students out of an enrollment of 1,435 and Brainerd having 184 black students out of an enrollment of 1,344 during the 1970-71 school year. However, both Howard, with an enrollment of 1,313 and Riverside, with an enrollment of 1,057, remained all black. The freedom of choice plan "having failed to undo segregation * * * freedom of choice must be held unacceptable." *Green* v. *County School Board of New Kent County,* 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

The School Board proposes to accomplish a unitary school system within the high schools by zoning the four general curricula high schools with the following results in terms of student ratios:

	Black Students	*White Students*
Brainerd High School	32%	68%
Chattanooga High School	44%	56%
Howard High School	75%	25%
Riverside High School	75%	25%

The plaintiffs have interposed objections to the defendants' high school plan upon the ground that it does not achieve a racial balance in each school. To some extent these objections are based upon matters of educational policy rather than legal requirements. It is of course apparent that the former white high schools, particularly Brainerd High School, remain predominantly white and that the former black high schools remain predominantly black. However, the defendants offer some evidence in support of the burden cast upon them to justify the remaining imbalance. The need for tying the high school zones to feeder junior high schools is part of the defendants' explanation. Residential patterns, natural geographical features, arterial highways, and other factors are also part of the defendants' explanation.

A matter that has given concern to the Court, however, and which the Court feels is not adequately covered in the present record, is the extent to which the statistical data upon which the defendants' plan is based will correspond with actual experience. Among other matters there appears to be substantial unused capacity in one or more of the city high schools. Before the Court can properly evaluate the reliability of the statistical data regarding the high schools, the Court needs to know whether the unused capacity does in fact exist and, if so, where it exists, whether it will

be used and, if so, how it will be used. It would be unfortunate indeed if experience shortly proved the statistical data inadequate and inaccurate and this Court was deprived of the opportunity of considering those matters until on some appellate remand, as occurred in the recent case of *Davis* v. *Board of School Commissioners of Mobile,* 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577.

The plaintiff has submitted a high school plan with high school zones which the plaintiff's witness has testified will achieve a racial balance in each high school. However, this plan is not tied into the junior high school plan hereinabove approved and the Court is unable to say whether it could be so tied in. Furthermore, the same statistical problem discussed above would appear to exist with regard to the plaintiff's plan.

The Court accordingly is unable to give final approval to a high school desegregation plan at this time. Time, however, is a pressing factor. Pre-school activities will commence at each high school within less than a week, if in fact they have not already commenced. Full commencement of the fall term is only one month away. It is clear that the high schools must move at least as far as is proposed in the defendants' high school plan. Accordingly, the Court will give tentative approval only at this time to the defendants' high school plan in order that at least as much as is therein proposed may be placed into operation at the commencement of the September 1971 term of school. Further prompt but orderly judicial proceedings must ensue before the Court can decide upon a final plan for desegregation of the high schools.

Decision of Court of Appeals dated October 20, 1975

> In the meanwhile, the defendants will be required to promptly provide the Court with information upon the student capacity of each of the four high schools under discussion, upon the amount of unused space in each of the four high schools, the suitability of such space for use in high school programs, and the proposed use to be made of such space, if any. In this connection the defendants should likewise advise the Court regarding its plan as to tuition students. Last year almost one-third of the total student body at City High School were nonresident tuition paying students. There is no information in the present record as to the extent the Board proposes to admit tuition students nor the effect this might have on the racial composition of the student body. The Court has no disapproval of the admission of tuition students nor to the giving of preference to senior students in this regard, provided that the same does not materially and unfavorably distort the student racial ratios in the respective schools. Otherwise, the matter of admitting tuition students addresses itself solely to the discretion of the Board. No later than the 10th day of enrollment the defendants will provide the Court with actual enrollment data upon each of the four high schools here under discussion.
>
> *Mapp* v. *Board of Education of the City of Chattanooga, supra* at 1384-86.

In his second opinion he said:

> Tentative approval only having heretofore been given to the School Board plan for desegregation of the Chattanooga high schools other than Kirkman

> Technical High School (to which final approval has been given). Further consideration must be given to this phase of the plan. At the time that the Court gave its tentative approval to the high school desegregation plan, the Court desired additional information from the Board of Education as to whether three, rather than four, general purpose high schools would be feasible or desirable in Chattanooga. It now appears, and in this both parties are in agreement, that three general purpose high schools rather than four is not feasible or desirable, at least for the present school year. Having resolved this matter to the satisfaction of the Court, the defendant Board of Education will accordingly submit a further report on or before June 15, 1972, in which they either demonstrate that any racial imbalance remaining in the four general purpose high schools is not the result of "present or past discriminatory action on their part" *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. at 26, 91 S.Ct. at 1281, 28 L.Ed.2d 554 at 572, or otherwise, and to the extent that the Board is unable to demonstrate that such racial imbalance which remains is not the result of past or present discriminatory action, they should submit a further plan for removal of all such remaining racial discrimination, the further plan likewise to be submitted on or before June 15, 1972.
>
> *Mapp* v. *Board of Education of the City of Chattanooga, supra* at 200.

The opinion and order we now review are quite different, and if approved by this Court and the Supreme Court, would represent both a final approval of the school board's current "plan" for operation of the high schools and hold-

ing that the present operation represents desegregation of the previously legally segregated dual high school system.

In the opinion we now review Judge Wilson said:

> The Court is accordingly of the opinion that the defendants have failed to establish either such changed conditions as would render its formerly court-approved plan of school desegregation inadequate or improper to remove "all remaining vestiges of state imposed segregation" or that its newly proposed plan would accomplish that result.
>
> To the extent that the Court has previously given only tentative approval to the high school zoning plan, final approval will now be given that plan. Two high schools, Howard High School and Riverside High School, have not acquired an enrollment of white students as projected by the Board when the plan was proposed in 1971, but rather have remained substantially all black. It was a concern for the accuracy of these projections that caused the Court to initially give only tentative approval to the high school zoning plan. However, subsequent evidence has now demonstrated that changing demographic conditions within the City and other *de facto* conditions beyond the control and responsibility of the School Board, including the voluntary withdrawal of white students from the system, have become the causative factors for the present racial composition of the student body in those schools, and not the original action of the Board in creating segregated schools at these locations. It should be recalled in this connection that the plan previously approved included provision for students to elect to transfer from a school in which they were in a majority to a school in which they would be in a minority.

> *Mapp* v. *Board of Education of the City of Chattanooga*, 366 F.Supp. 1257, 1260-61 (E.D.Tenn.1973).

Thus, clearly, we now have before us the issue as to whether or not in the Chattanooga high schools previous unconstitutional segregation has been eliminated "root and branch." *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

Defendants-appellees accept (as they must) the responsibility of meeting the standard of *Green* v. *County School Board of Kent County, supra:*

> It is against this background that 13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of respondent School Board's "freedom-of-choice" plan to achieve that end.
>
> The School Board contends that it has fully discharged its obligation by adopting a plan by which every student, regardless of race, may "freely" choose the school he will attend. The Board attempts to cast the issue in its broadest form by arguing that its "freedom-of-choice" plan may be faulted only by reading the Fourteenth Amendment as universally requiring "compulsory integration," a reading it insists the wording of the Amendment will not support. But that argument ignores the thrust of *Brown II*. In the light of the command of that case, what is involved here is the question whether the Board has achieved the "racially nondiscriminatory school system" *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened

the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelling dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. See *Cooper* v. *Aaron, supra* [358 U.S. 1] at 7 [78 S.Ct. 1401, 3 L.Ed.2d 5]; *Bradley* v. *School Board*, 382 U.S. 103 [86 S.Ct. 224, 15 L.Ed.2d 187]; cf. *Watson* v. *City of Memphis*, 373 U.S. 526 [83 S.Ct. 1314, 10 L.Ed.2d 529]. The constitutional rights of Negro school children articulated in *Brown I* permit no less than this; and it was to this end that *Brown II* commanded school boards to bend their efforts.[4]

---

[4] "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U.S. 145, 154 [85 S.Ct. 817, 822, 13 L.Ed.2d 709]. Compare the remedies discussed in, *e. g.*, *NLRB* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241 [60 S.Ct. 203, 84 L.Ed. 219]; *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 [65 S.Ct. 254, 89 L.Ed 160]; *Standard Oil Co.* v. *United States*, 221 U.S. 1 [31 S.Ct. 502, 34 L.R.A.,N.S., 834 55 L.Ed. 619]. See also *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 232-234 [84 S.Ct. 1226, 1233-1235, 12 L.Ed.2d 256].

In determining whether respondent School Board met that command by adopting its "freedom-of-choice" plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a "prompt and reasonable start." This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for "the governing constitutional principles no longer bear the imprint of newly enunciated doctrine." *Watson* v. *City of Memphis, supra* [373 U.S.] at 529 [83 S.Ct. [1314] at 1316]; see *Bradley* v. *School Board* [*City of Richmond, Va.*], *supra; Rogers* v. *Paul,* 382 U.S. 198 [86 S.Ct. 358, 15 L.Ed.2d 265]. Moreover, a plan that at this late date fails to provide a meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. "The time for mere 'deliberate speed' has run out," *Griffin* v. *County School Board* [*of Prince Edward County*], 377 U.S. 218, 234 [84 S.Ct. 1226, 1235, 12 L.Ed.2d 256], "the context in which we must interpret and apply this language [of *Brown II*] to plans for desegregation has been significantly altered." *Goss* v. *Board of Education* [*of City of Knoxville, Tenn.*], 373 U.S. 683, 689 [83 S.Ct. 1405, 1409, 10 L.Ed.2d 632]. See *Calhoun* v. *Latimer,* 377 U.S. 263 [84 S.Ct. 1235, 12 L.Ed.2d 288]. The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now.*

Green v. *County School Board of New Kent County, supra* at 437-39, 88 S.Ct. at 1693.

Decision of Court of Appeals dated October 20, 1975

At the outset we note that we deal with a school district which at the time of the beginning of this litigation was clearly and concededly a dual school system segregated by race according to state statute. We therefore are required to determine whether or not a public high school system (racially constituted during the 1973-74 school year as follows) can be held by this court to have been desegregated "root and branch":

	White	Black	% White	% Black
Howard	10	999	1	99
Riverside	3	721	1	99
Chattanooga	439	330	57	43
Brainerd	646	404	61	39

There can, of course, be no doubt that Howard and Riverside High Schools are "racially separate public schools established and maintained by state action." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 5, 91 S.Ct. 1267, 1271, 28 L.Ed.2d 554 (1971). Both were built as Negro schools under state law which required a dual school system. T.C.A. §§ 2377, 2393.9 (Williams 1934). Twenty-one years after decision of *Brown* v. *Board of Education of Topeka,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), both high schools (encompassing 60% of the black high school population of Chattanooga) are still (and always have been) essentially 100% black. As to these schools and students, there has been no desegregation at all.

Defendants-appellees contend that two measures which they took should be accepted as the equivalent of desegregation. They are: 1) the inauguration of a freedom of choice plan, and 2) a change in zone boundaries which

was calculated (it is claimed) to introduce 25% of white students into both high schools. Defendants-appellees freely admit that neither measure was effective in changing the segregated character of the Howard and Riverside High Schools.

As to the freedom of choice plans, the Supreme Court has repeatedly held that ineffective freedom of choice plans are not a substitute for desegregation in fact. *See Green* v. *County School Board of New Kent County, supra; Monroe* v. *Board of Commissioners of the City of Jackson,* 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968).

Defendants-appellees' strongest reliance is upon the second contention that they "zoned" 25% white students into Howard and Riverside but that the white students thus assigned avoided the assignment by "white-flight." As to this measure, we have no findings of fact concerning defendants-appellees' contention. But if we assumed their truth, we clearly would not have exhausted the possibilities for successful desegregation nor satisfied the constitutional command. Many possibilities for desegregation remain, including pairing of white and black schools and high school construction which would make desegregated zones more feasible. In any instance, the defendant school board should be required to propose a new and realistic plan to meet its constitutional duty. *See Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 15-21, 91 S.Ct. 1267; *Brinkman* v. *Gilligan,* 518 F.2d 853 (6th Cir. 1975).

In my judgment the case should be affirmed as to the grade schools and junior high schools. The judgment should be vacated and remanded as to the high schools. All other issues presented by either party should be summarily denied.

Order of Court of Appeals dated January 27, 1976

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

Jan. 27, 1976.

No. 74-2100.

JAMES JONATHAN MAPP, et al.,

Plaintiffs-Appellants,

v.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, et al.,

Defendant-Appellees.

Before:

WEICK, EDWARDS and ENGEL,

Circuit Judges.

ORDER

This cause, 6 Cir., 525 F.2d 169, came on for hearing on the petition for rehearing with a suggestion that it be reheard en banc.

Judges Edwards and McCree having requested en banc rehearing for the reasons set forth in Judge Edwards' dissenting opinion, but it appearing to the court that less than a majority of the court has voted in favor thereof, the petition for rehearing was referred to the panel which originally heard the appeal and was determined not to be well taken, Judge Edwards dissenting.

Order of Court of Appeals dated January 27, 1976

It is therefore ordered that the petition for rehearing be denied.

EDWARDS, Circuit Judge (dissenting).

Although the Board of Education of the City of Chattanooga has at long last, under orders of the Supreme Court of the United States, this court, and the United States District Court, proceeded to bring both its grade schools and junior high schools into compliance with the Constitution of the United States, as to two of its high schools it has signally failed to do so. The majority opinion of this court would establish as law the proposition that approximately 60% of the black children of the Chattanooga high school system may be continued forever in complete segregation in all-black high schools. The two black high schools at issue were built as such under state law that required a racially dual school system and have been continuously segregated as such down to this very moment.

There can be no doubt that the two black high schools are racially separate public schools established and maintained by state action and that as to these schools there has been no desegregation at all. In my judgment it simply cannot be said with any accuracy that the possibilities for successful desegregation have been exhausted. As to these schools the School Board should be required to propose a new and realistic and effective plan to meet its constitutional duty.

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1077

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, et al.,

Petitioners,

vs.

JAMES JONATHAN MAPP, et al.,

Respondents.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RAYMOND B. WITT, JR.,
Witt, Gaither, Richardson, Hennies & Whitaker
1100 American National Bank Building
Chattanooga, Tennessee 37402
Attorneys for Petitioners

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

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THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, et al,
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Pursuant to Rule 24 (5) the Court is advised that on Thursday, January 29, 1976, petitioner received in the mail a copy of an order of the United States Court of Appeals for the Sixth Circuit denying the petition for rehearing of plaintiffs-appellants, James Jonathan Mapp, et al, in No. 74-2100, which order was filed on Tuesday, January 27, 1976. Said order with dissenting opinion by Judge Edwards are reproduced as Appendix F to the above peti-

tion as docketed with the Clerk of this Court on Friday, January 30, 1976, having been placed in the mail to the Clerk of the Supreme Court on Wednesday, January 29, 1976.

Respectfully submitted,

RAYMOND B. WITT, JR.,

Witt, Gaither, Richardson, Henniss & Whitaker

1100 American National Bank Building

Chattanooga, Tennessee 37402

Attorney for Petitioners

February 16, 1976

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-2100

JAMES JONATHAN MAPP, et al,
Plaintiffs-Appellants,

v.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, et al,
Defendants-Appellees.

ORDER

(Filed January 27, 1976)

Before: WEICK, EDWARDS and ENGEL, Circuit Judges.

This cause came on for hearing on the petition for rehearing with a suggestion that it be reheard en banc.

Judges Edwards and McCree having requested en banc rehearing for the reasons set forth in Judge Edwards' dissenting opinion, but it appearing to the court that less than a majority of the court has voted in favor thereof, the petition for rehearing was referred to the panel which originally heard the appeal and was determined not to be well taken, Judge Edwards dissenting.

It is therefore ordered that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

Re: James Jonathan Mapp v.
The Board of Education of the City
of Chattanooga, Tennessee

No. 74-2100

EDWARDS, Circuit Judge, dissenting. Although the Board of Education of the City of Chattanooga has at long last, under orders of the Supreme Court of the United States, this court, and the United States District Court, proceeded to bring both its grade schools and junior high schools into compliance with the Constitution of the United States, as to two of its high schools it has signally failed to do so. The majority opinion of this court would establish as law the proposition that approximately 60% of the black children of the Chattanooga high school system may be continued forever in complete segregation in all black high schools. The two black high schools at issue were built as such under state law that required a racially dual school system and have been continuously segregated as such down to this very moment.

There can be no doubt that the two black high schools are racially separate public schools established and maintained by state action and that as to these schools there has been no desegregation at all. In my judgment it simply cannot be said with any accuracy that the possibilities for successful desegregation have been exhausted. As to these schools the School Board should be required to propose a new and realistic and effective plan to meet its constitutional duty.

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1077

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, *et al.*,

Petitioners,

VS.

JAMES JONATHAN MAPP, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

JACK GREENBERG
JAMES M. NABRIT, III
DREW S. DAYS, III
10 Columbus Circle
New York, New York 10019

AVON N. WILLIAMS, Jr.
1414 Parkway Towers
Nashville, Tennessee 31249

Attorneys for Respondent

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1077

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, *et al.*,

Petitioners,

vs.

JAMES JONATHAN MAPP, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit of October 20, 1975 is reported at 525 F.2d 169 (6th Cir. 1975). Its opinion denying rehearing and rehearing *en banc* on January 27, 1976 is now reported at 527 F.2d 1388 (6th Cir. 1976).

Question Presented

Respondents submit that petitioners' third question, *Petition* p. 4, should read as follows:

> Did the lower courts err in rejecting a student assignment plan proposed by the Board of Education of

Chattanooga, Tennessee that would have perpetuated the existence of numerous all-black schools and have increased black percentages in other majority-black schools in order to ensure that as many white children as possible attended majority-white schools.

Statement of the Case

This school desegregation litigation was filed on April 6, 1960 on behalf of a class of black children and parents (respondents herein) seeking an end to state-imposed racial segregation in Chattanooga, Tennessee public schools. Though respondents have certain problems with the Statement of the Case by the petitioners (hereinafter, "the Board") we would submit that a full discussion of these matters is already contained in our petition, *James Jonathan Mapp* v. *The Board of Education of The City of Chattanooga, Tennessee,* 44 U.S. L.W. 3626 (U.S. April 27, 1976) (No. 75-1564) seeking review of lower court refusals to require the development of a new desegregation plan for Chattanooga schools. We would respectfully direct the Court's attention generally to pp. 3-13 of our petition in this respect, rather than repeating that discussion here in its entirety. As we pointed out in that context, a comprehensive desegregation plan was approved in July, 1971 that would have altered in certain regards the dual nature of the Chattanooga system. That plan had not been fully implemented in major respects, however, by the beginning of the 1973-74 academic year. By December, 1973, significant changes had occurred in the racial composition and physical configuration (as a result of annexations) of the system during this interim two and one-half years. Respondents argued that these changes rendered the 1971 desegregation plan obsolete and suggested that only a totally new plan would meet constitutional requirements.

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This suggestion and the Board's proposed modification were both rejected by the trial court prior to the commencement of the 1974-75 academic year. Full implementation of the 1971 plan occurred in September, 1974.

We would like to describe briefly here, however, the nature of the Board's proposed modification of the 1971 desegregation plan in light of the petition's silence in this regard. Generally, the avowed purpose of the Board's proposal was to achieve "a viable racial mix" in as many schools in the system as possible. As defined by the Board, "a viable racial mix" was having 20 to 40 percent black students and 80 to 60 percent white students in a Chattanooga school, even though the system-wide ratio at that time was 59% black and 41% white. In order to achieve this goal, the Board's approach was to close two majority-black elementary schools, increase black percentages in three majority-black elementary schools, leave eight elementaries 98-100% black, increase the black percentage at one majority black junior high school, leave four junior high schools 99% black and increase black percentages in two high schools from 95 to 99%. In sum, the Board proposed to create or maintain white majorities in as many schools as possible by increasing or maintaining black percentages in majority-black or all-black facilities. As was indicated *supra*, the Board's proposal came at a time when *no* comprehensive desegregation plan had ever been implemented in Chattanooga.

Argument

Petitioners have raised in their "Questions Presented" and "Statement of the Case" the issue of whether the lower courts were correct in rejecting the Board's 1973 attempt to modify the partially-implemented 1971 de-

segregation plan. To the extent that petitioners desire that issue reviewed, nothing in their petition warrants such consideration by this Court. For the lower courts were required by *Swann* v. *Charlotte-Mecklenburg*, 402 U.S. 1 (1971) and *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968) to reject a plan that proposed to increase black percentages in majority-black schools and to perpetuate the existence of numerous all-black schools within the system.

Moreover, in their "Reasons for Granting the Writ," it becomes clear that what petitioners seek primarily from this Court is review not of that issue but rather of rulings denying respondents' 1973 request for a new desegregation plan. Two of the three questions presented involve rulings favorable to the Board. (*Petition*, at 3-4) And much of the Board's discussion is devoted to demonstrating why the lower court decisions were correct. For example, the Board states:

> The net effect of the respondents' petition in the court of appeals is to impose a completely new desegregation plan upon the Chattanooga system, as a constitutional requirement, at a point in time when CBE has been held to be in compliance by the district court, which judgment has been affirmed by the majority opinion in the court of appeals. How is it possible to justify seeking a completely new plan when the district court's own factual finding says there is no default? (*Petition*, at 17-18)

Subsequently, it argues:

> The respondents persist in their efforts to eliminate the "official action" element from consideration. The current push for a completely new desegregation plan

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> for Chattanooga is consistent with this objective. The respondents are blind to the flat holding by the district court that any objectionable racial imbalance remaining was caused by factors "not within any reasonable responsibility of the board." That the affirmative duty had been accomplished was recognized, explicitly by the court of appeals in its affirmance. (*Id.*, at 23-24)

Furthermore, at other points in the petition, the Board holds up the decisions below as models that should guide this Court in resolving broad issues with respect to desegregation allegedly raised but not decided in *Swan, supra.* At 20, the Board suggests that while district courts in other cases have ignored state action and causation, the court in Chattanooga did not. At 27, it asserts that district courts in other cases have not given school boards "the benefit of the doubt" with respect to racial balance, whereas the Chattanooga court *did* give such benefit to the Board.

Consequently, the petition for a writ of certiorari is nothing more than an attempt to have this Court review decisions of the district court and court of appeals which were *favorable* to the Board. The granting of a writ of certiorari under these circumstances would be, we submit, highly inappropriate. *Public Service Commission* v. *Brashear Lines,* 306 U.S. 204, 206 (1938).

CONCLUSION

For the foregoing reason, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
DREW S. DAYS, III
10 Columbus Circle
New York, New York 10019

AVON N. WILLIAMS, Jr.
1414 Parkway Towers
Nashville, Tennessee 31249

Attorneys for Respondent

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MAY 12 1976
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. 75-1564

JAMES JONATHAN MAPP, et al.,

Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RAYMOND B. WITT, JR.,
WITT, GAITHER, RICHARDSON, HENNISS & WHITAKER
1100 American National Bank Building
Chattanooga, Tennessee 37402
Attorneys for Respondent

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

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In The

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent accepts Petitioners' statement of jurisdiction but cannot accept their statement of the question presented or the statement of the case.

COUNTER STATEMENT OF THE QUESTIONS PRESENTED

The questions presented which were correctly resolved by the District Court and the Appellate Court are whether a formerly de jure dual school system is under a continuing annual responsibility to assign its white children throughout the school system in such a manner as to avoid having any schools with a racial balance disproportionate to the system-wide racial balance where such racial disproportion as may then exist in the system "is not the result of any present

or past discrimination upon the part of the Board or other state agency," but "rather is a consequence of demographic and other factors not within any reasonable responsibility of the Board."[1] The District Court and the Court of Appeals answer was in the negative and should be affirmed by a denial of the Petitioners' petition for a writ of certiorari.

The second issue correctly decided by the District Court and the Appellate Court is as follows: whether once a de jure school system has implemented a desegregation plan, as approved by the District Court and the Court of Appeals, with petition having been denied by the United States Supreme Court, is there any Constitutional requirement that additional white students received into the school system through annexation subsequent to the District Court order be dispersed throughout the system in order to achieve a racial balance system-wide? Both the District Court and the Court of Appeals answered this question in the negative and should be affirmed by this court's denial of the Petitioners' petition for writ of certiorari.

The October 20, 1975 2-1 decision of the Court of Appeals affirms the District Court without any qualifications. A petition for rehearing and a suggestion of a rehearing en banc in said case was denied by the Court of Appeals on January 27, 1976. A copy of said opinions appears as *Appendix A* to this brief in opposition.

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[1] *Mapp* v. *Board of Education of Chattanooga*, 329 F.Supp. 1374, 1384 (aff'd 477 F.2d 851) (6th Cir. 1973), cert. denied, 414 U.S. 1022 (1973). As to the Junior High Schools the District Court said:

> "Rather, such limited *racial imbalance* as may remain is the consequence of demographical, residential, or other factors which in no reasonable sense could be attributed to School Board action or *inaction*, past or present, nor to that of any other state agency. The Court is accordingly of the opinion that the defendants' plan for desegregation of the Chattanooga Junior High Schools will eliminate 'all vestiges of state imposed segregation' as required by the *Swann* decision." (Emphasis added)

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STATEMENT OF THE CASE

The Action Under Review Here

This petition seeks to review a judgment of the District Court in a school desegregation case affirmed by the United States Court of Appeals for the Sixth Circuit, where the District Court refused to order the submission of a new desegregation plan when two high schools remained substantially all-black in spite of affirmative efforts by the Chattanooga Board of Education (hereinafter referred to as CBE) to desegregate said schools and where subsequent and proposed territorial annexation would appear to provide additional white students in the system. Such is the essence of respondent's appeal, Case No. 74-2100, and the Court of Appeals affirmed.

All of the testimony with reference to the subsequent and proposed annexation was introduced by the Petitioners in rebuttal and response to a motion for further relief by CBE requesting amendment of the Amended Desegregation Plan of June 16, 1971. The motion of CBE was the reason for the evidentiary hearing in October of 1973.

The District Court's opinion also refused to allow CBE to amend a previously approved desegregation plan involving decisions based upon race, contiguous busing, pairing, clustering, and racial gerrymandering of zones. The limited amendment was sought by respondent (CBE) in order to receive the Court's permission to implement changes in the desegregation plan designed to diminish the white withdrawal from the system. The Court of Appeals affirmed the District Court, No. 74-2101.

Factual Background

On July 22, 1955, respondent issued its initial statement of policy in response to the decisions of this Court in *Brown* v. *Board of Education of Topeka I*, 347 U.S. 483, and *Brown II*, 349 U.S. 295, decided on May 17, 1954 and May 31, 1954, respectively, on the subject of student desegregation in public

schools. The opening paragraph of said statement read as follows:

> "The Chattanooga Board of Education will comply with the decision of the United States Supreme Court on the matter of integration in the public schools."[2]

The Board immediately undertook a process of elucidation with the formation of an interracial advisory committee.[3]

The elucidation process was continued until this litigation was filed on April 6, 1960. A gradual desegregation plan was approved in 1962 with 16 selected elementary schools being desegregated in September of that year in grades one, two, and three. All dual zones would have been abolished by 1968. At that point in time all parties presumed such to be compliance with the Constitution.

The pace of the desegregation was accelerated pursuant to District Court order following a motion for further relief by plaintiffs, filed March 29, 1965. The complete elimination of dual zones in all grades was effected by December, 1966. Subsequent to affirmance by the Court of Appeals,[4] the only issue remaining was that of faculty assignments until February of 1971 when the District Court dismissed a motion by Petitioners for summary judgment, but set an evidentiary hearing classifying the issues for trial and placing the burden of proof upon Respondent to prove that the actions taken by Respondent met the obligation to establish a unitary school system.

Shortly after this Court's opinion in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (4/20/71) in May, the evidentiary hearing was completed and a new desegregation plan was ordered to "maximize integration" re-

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[2] The complete text of this statement appears as *Appendix C* in a petition filed by CBE with this Court on January 29, 1975, No. 75-1077.

[3] Said statement appears as *Appendix D* in petition No. 75-1077.

[4] 373 F.2d 75 (1967).

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quiring for the first time decisions based upon race for the purpose of achieving an adequate constitutional remedy.[5]

Initial and partial implementation of the 1971 desegregation plan began in September of 1971 under the supervision of the District Court.

Petitioners took an appeal from this decision on the basis that the deviations from a racial balance in the approved plan were unacceptable and unconstitutional. A cross appeal was taken by CBE contending that remedial measures permitted by this Court in *Swann* were permissible, not required, and only in a school system found to be in default of its constitutional obligation; and that CBE was not in default. CBE further contended that the District Court opinion in its reference to maximizing integration read the racial balance language in *Swann* as being constitutionally mandatory and not merely "a starting point."

In a 2-1 Appellate Court decision rendered on October 11, 1972 the case was remanded to the District Court. Following a motion for rehearing and suggestion of rehearing en banc by petitioners, a rehearing en banc was granted with oral argument taking place on December 14, 1972. On April 30, 1973, 477 F.2d 851, an en banc decision of the Court of Appeals reversed the 2-1 decision and affirmed the District Court's opinion.[6]

In the summer of 1973 and as a result of the experience of two years under the amended desegregation plan, CBE, having experienced substantial withdrawal of white students from the system, conducted a careful evaluation of the system and particularly the possible causes of the withdrawal from the schools. The 1971 amended desegregation plan had not been fully implemented in the elementary and junior high schools

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[5] 329 F.Supp. 1374 (1971).

[6] 477 F.2d 851, with Judges Weick and O'Sullivan dissenting and with a separate concurrence by Judge Miller.

during the two years experience under examination. CBE also made a projection of the possible impact upon the system of additional busing projected for full implementation of the plan. Recognizing the possible constitutional obligation upon a board to avoid inaction which might later be alleged to have contributed to student resegregation, CBE, on July 20, 1973, filed a Motion for Further Relief: to Adjust Amended Plan of Desegregation, as filed June 16, 1971. An extended evidentiary hearing was held in Octber of 1973 in which the actual experience of CBE in September of 1971, September 1972, and September 1973 was presented to the District Court, as well as CBE's plan for attempting to counter the white student withdrawal as reflected by the statistical data for the three years in question.

In rebuttal, Petitioners offered testimony with reference to the probable impact of the completion of annexation (then imminent) of certain areas contiguous to the Chattanooga system with said areas being populated predominately by white students.

CBE's motion to amend the plan was denied in an opinion entered on November 16, 1973. Such opinion provided specific guidelines to CBE as to the creation of zones with reference to annexed schools, the adjustment of zones within the system, and further providing that any such creation or adjustment of zones would be required to be submitted to the federal court 30 days prior to their effective date.

On December 26, 1973, Petitioners filed a motion to amend the memorandum opinion of November 16, 1973 and for a new trial and further relief. Said motion was supplemented with an amendment on January 7, 1974. Said motion was denied by the District Court on June 20, 1974 and subsequent thereto on July 12, 1974 Petitioners filed a notice of appeal requesting a complete new desegregation plan for the Chattanooga system. Subsequent thereto on July 22, CBE filed a cross appeal with reference to the District Court's denial of its

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motion to amend the plan. Both cases were docketed in the Appellate Court on September 30, 1974.[7]

The appellate oral argument was held on April 18, 1975 resulting in a 2-1 decision affirming the District Court without qualifications, said opinion being filed on October 20, 1975.[8] Thereafter, the Petitioners filed "Motion for Rehearing or Rehearing en banc" on November 4, 1975 followed by an "Amended Petition for Rehearing and Suggestion of Rehearing en banc" on November 21, 1975, pursuant to a grant of extension in time in which to file said amendment, having been noted on November 4, 1975.

In the interim between the filing of the original motion for rehearing and the filing of the petition for rehearing, this Court granted certiorari in the case of *Pasadena City Board of Education, et al.* v. *Nancy Anne Spangler, et al.* and *United States of America,* No. 75-164, on November 11, 1975.

In the amended petition of November 21, 1975 Petitioners brought to the attention of the Court of Appeals the second question presented in the petition for writ of certiorari filed on behalf of the Pasadena City Board of Education which read as follows:

> "2) Is a school system required to amend its judicially validated desegregation plan to accommodate for annual demographic changes for which it is in no way responsible? Id., at 3271."

The Petitioners went on to suggest that this Court's decision in *Spangler* might clarify the language of *Swann* with respect to the need for "year to year adjustments" and provide guidance to the Court of Appeals in re-evaluating its decision in the *Chattanooga* case. In the conclusion to their petition of No-

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[7] For a more complete statement of the facts from July, 1955 forward, see *Appendix E* to CBE's petition before this Court, No. 75-1077.

[8] Pages 8(a) through 27(a) inclusive in Petitioners' Appendix and pages 1(a) through 17(a) of Respondent's petition in No. 75-1077.

vember 21, 1975, Petitioners went on to request that any action upon their motion for rehearing be stayed, pending this Court's decision in *Spangler, supra.*

Upon receiving notification on November 11, 1975 of the action of this Court in granting certiorari in *Spangler,* CBE's counsel requested and received a copy of the petition for writ of certiorari as filed on behalf of the Pasadena School Board. Following an analysis of this petition, CBE sought and received permission from counsel in the *Spangler* case to file an amicus curiae brief in that case. The brief was filed in the last week of December 1975.

On January 27, 1976 an order by the Appellate Court was filed denying Petitioners' petition for a rehearing.[9]

The next day, Wednesday, January 28, 1976, a petition by CBE seeking a writ of certiorari to review the judgment of the United States District Court, Eastern District of Tennessee, Southern Division, made and entered into this case pursuant to the memorandum opinion of November 16, 1973, and/or the affirmance of said opinion of the District Court affirmed by the United States District Court of Appeals for the Sixth Circuit on October 20, 1975, was placed in the mail from Cincinnati, Ohio directed to the Clerk of the United States Supreme Court.

On the following day, Thursday, January 29, CBE received in the United States mail its first notice of the action of the United States Court of Appeals for the Sixth Circuit in the form of a copy of an order denying the petition for rehearing of plaintiffs-appellants, James Jonathan Mapp, et al, in No. 74-2100, as filed on Tuesday, January 27. Said petition by CBE was received and filed by the Clerk of this Court on Friday, January 30.

Petitioners herein did not respond to said petition by CBE. On Saturday, April 17, 1976, counsel for CBE received a copy of a letter addressed to counsel for Petitioners herein from the clerk of this court dated April 14, 1976, indicating this Court's

[9] Pages 28(a), 29(a) Petitioners' Appendix, and pages 18a, 19a of Respondent's Appendix hereto.

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request that Petitioners herein respond to the January 30, 1976 petition by CBE, No. 75-1077.

Subsequent thereto on Monday, April 26, 1976, this petition was filed with the Clerk of this Court and counsel for CBE received a copy thereof on April 28, 1976.

There are numerous inaccuracies reflected in the statement of the case by Petitioners. Illustrative is the reference on page three referring to the District Court order of February 4, 1972 approving the Board's plan to establish a system-wide vocational technical high school. The record will indicate that CBE has maintained a system-wide vocational technical high school since 1966. In fact, counsel for Petitioners excluded consideration of the Kirkman Technical School from the scope of the desegregation plan by a statement in open court during the initial part of the hearing in 1971.

The initial appeal from the decision of November 16, 1973 was that of the Petitioners after the District Court Judge denied their motion to amend said order and for a new trial and/or further relief. It was subsequent to and as a result of this action by Petitioners that the decision was made by CBE to cross appeal from that part of the District Court opinion denying their request for permission to amend its plan.

A further inaccuracy is reflected on page six where it is indicated that the four high schools would be "utilized fully for academic programs." All of the high schools have other than academic programs and the change was to make the programs in all four high schools substantially similar with regard to their educational content including the nonacademic area.

In 1971 the Board's projections with reference to the affirmative action to desegregate Riverside and Howard were in no part dependent upon current proposals for elementary and junior high school facilities. The initial projections were based upon students actually in the 9th grade, the 10th grade, and the 11th grade in the zones as redrawn at the direction of the Court.

An examination of *Exhibit B* would indicate that the following references on page seven were inaccurate:

> "Since the plan was not implemented in any meaningful sense in September 1971, . . ."
>
> "No implementation of elementary provisions of the Board's 1971 plan had occurred by the start of the 1972-73 academic year."

On page nine and ten the Petitioners state:

> "It also approved the Board's proposal to assign students from the newly annexed areas to over 80% white facilities."

The proposal to the District Court by CBE in October 1973 did not include any proposals with reference to student assignment in newly annexed areas subsequent to the hearing.

REASONS FOR DENYING THE WRIT

Certiorari should be denied because the decision of the Court of Appeals is consistent completely with applicable decisions of this Court in *Brown I* and *II* and its progeny, particularly *Swann*.

Demographic changes and other changes within a school system, subsequent to district court approval of an amended plan of desegregation, when not caused either directly or indirectly by such school system's action or inaction, have no relevance to the affirmative desegregation constitutional duty of the school system even though undesirable racial proportions in schools in the system are the result.

The argument of the Petitioners ignores cause. They construe the constitution to require a school board to act affirmatively to eradicate racial segregation no matter what caused the racial segregation; and when their own statement of their interpretation of the Constitution is limited to "state-imposed segregation."[10]

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[10] Petition, p. 14.

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And further as primary support for such a constitutional conclusion, Petitioners proceed immediately to quote from this Court's opinion in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). Such quotation utilizes "state-enforced discrimination" and "state-imposed segregation" indicating with unquestioned clarity that this Court was not in any manner directing its attention to racial segregation caused by other than state action.

If the Petitioners' constitutional interpretation is accepted, all of the states of the Union must then assume, as a constitutional duty, the affirmative obligation to act to remove all racial segregation which may exist in the future, without any consideration of cause. This Court has not so construed the Fourteenth Amendment. *Brown I* and *II* were concerned solely with complete school segregation created solely by the state.[11]

Mr. Justice Brennan's unanimous opinion in *Green* v. *County School Board of New Kent County, Virginia*, 391 U.S. 430 (1968), the repeated references to "state-imposed segregation" made it clear that this Court was not addressing its attention to racial segregation no matter what its cause.[12] *Swann, supra,*

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[11] "In each instance they have been denied admission to schools attended by white children under laws *requiring* or permitting segregation according to race." *Brown I*, pp. 487-8. (Emphasis added)

[12] *Green, supra,* included the following:

". . . the State acting through the local school board and school officials, organized and operated a dual system, . . ." page 435.

". . . in the context of the State-imposed segregated pattern . . ." page 432.

". . . then operating State-compelled dual systems . . ." page 432.

". . . toward disestablishing State-imposed segregation." page 439.

". . . for dismantling the State-imposed dual system . . ." page 439.

". . . and the Court should retain jurisdiction until it is clear that State-imposed segregation has been completely removed." page 439.

"A desegregation program to effectuate conversion of a State-imposed dual system to a unitary, non-racial system . . ." page 441.

was completely consistent with this constitutional concept re-enforcing it with eight or more direct references, in a manner such as to permit no suggestion of ambiguity.[13]

Petitioners' theory is then supported by wholly inaccurate references to the racial changes since 1971 in an effort to convince this Court that defendant CBE has somehow misled the District Court and the Appellate Court by submitting a paper plan and then failing to implement such plan.

The pace and the scope of racial desegregation in the Chattanooga School System (CSS) is reflected in the eight pages of *Exhibit B* to this opposition brief. Such is only a minute portion of the statistical facts submitted to the District Court during the evidentiary hearing in October of 1973.[14]

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[13] "We granted certiorari in this case to review important issues as to the duties of school authorities and the scope of powers of Federal Courts under this Court's mandates to eliminate racially separate schools *established and maintained by state action.*" (Emphasis added) *Swann*, supra, p. 5.

". . . state-imposed segregation by race in public schools denies equal protection of the laws." p. 11

". . . where dual school systems had historically been maintained by operation of state laws." Such is followed by a quote from *Green* which includes the term 'state-imposed segregation.' p. 13

". . . the massive problem of converting from the state-enforced discrimination . . ." p. 14

". . . to eliminate from the public schools all vestiges of state-imposed segregation . . ." p. 15

". . . the responsibilities of school authorities in desegregating a state-enforced dual school system . . ." p. 18

". . . a potent weapon for creating or maintaining a state-segregated school system . . ." p. 21

[14] Exhibit No. 3, Book entitled, "Chattanooga Public Schools, Chattanooga, Tennessee, Attendance Zones. Pupil Enrollment Data, Part III, Summary Analysis of Enrollment Experience, Black-White Ratio Stability" introduced as evidence (with a copy handed to local counsel, Mr. Williams) on October 3, 1973, Volume I, page 148 of the trial transcript. Such data was prepared from school system summary reports Form OS/CR 102, entitled "Elementary and Secondary School Civil

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Petitioners represent to this Court (p. 15) that "By the end of the 1972-73 academic year, however, little of the 1971 desegregation plan had advanced beyond the drawing board." (It should be remembered that dual zones had been entirely disestablished in this system in 1966.) Twenty-three (23) of the twenty-nine (29) elementary schools were then desegregated. One all-black elementary school, Avondale, had shifted from all-white in 1962-63, to all-black in 1971-72 *without any action* upon the part of CBE. Bell, Donaldson, Pineville, Piney Woods, and Trotter had not been desegregated because of the lack of transportation needed to implement the 1971 amended plan. East Lake, Highland Park, Howard, Normal Park, Orchard Knob, Pineville and Smith were not substantially desegregated because of the same reason. However, such implementation was ordered by the District Court's opinion of November 16, 1973, which is the subject of this appeal. Since such final compliance transpired subsequent to the October 1973 hearing, these facts are not in the record on appeal as it was fully implemented in January-February of 1974. The statistical and other evidence of such implementation is now a part of the District Court record as an exhibit to an affidavit of the School Superintendent, Dr. James W. Henry, filed on August 2, 1974. Such facts were made available to the Court of Appeals prior to or during the oral argument of April 18, 1975.

The tone and detail of the Petitioners' argument is designed to convince this Court that CBE has somehow hoodwinked both the District and the Appellate Court. The facts reflected in *Exhibit B* considered alone negate any such conclusion or inference. The respondent suggests that judicial notice of these facts is necessary for the Court's evaluation of factual inaccuracies which appear throughout the petition.

In the first full paragraph on page 16, the petition com-

Rights Survey" filed each year by CBE as required under Title VI of the Civil Rights Act of 1964, U.S. Department of Health, Education and Welfare, Office of Civil Rights, Washington, D. C.

plains that the action of the District Court Judge characterizes "the situation as one in which a . . . plan . . . had been implemented fully . . ." The record is that the District Court in 1973 ordered full implementation of the elementary and junior high schools but recognized that the high school part of the plan had been fully implemented by the introduction of zoning at the high school level.[15] Freedom of choice for the high schools only had been in effect since 1966 since the dual zones had been abolished. The three formerly all-white high schools had been substantially desegregated voluntarily by 1971. (See *Exhibit B*, p. 27a).

The dissent at the Appellate level confirms the above analysis with reference to elementary and junior high schools with the opening sentence of his dissent from the denial of the petition to rehear:

> "Although the Board of Education of the City of Chattanooga has at long last, under orders of the Supreme Court, and the United States District Court, proceeded *to bring its grade schools and junior high schools into compliance with the Constitution of the United States,* as to two of its high schools it has signally failed to do so." (emphasis added)

Petitioners confusion is further reflected on page 18 where it states that the Court of Appeals, ". . . operated on the incorrect assumption that the 1971 (high school) provisions had been fully implemented in September of 1971." Such was a fact, and not an incorrect assumption, evident from the record, not challenged in the trial court.[16] The plan did not

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[15] *Mapp* v. *Board of Education*, 366 F.Supp. 1257 (1973) p. 1261:

> "It further appears from the testimony given upon the recent trial of this cause that the defendants are prepared to promptly effect implementation of the final school desegregation plan herein approved. Such implementation shall be effected no later than the commencement of the midyear school semester."

[16] p. 27a of *Appendix B*, hereto.

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produce its desired result as to high schools, but such was not due to failure to implement, but for other reasons beyond the control of CBE and so found to be a fact by the District Court; a fact found by the Court of Appeals not to be clearly erroneous.[17]

The allegation that CBE has immunized its system "from effecting any meaningful desegregation" is in stark contrast to the results. So is the charge that it pursued "every tactical advantage to postpone the day when its implementation is actually required." (p. 19)

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[17] pp. 5a, 6a of Appendix A hereto:

> Having implemented the plan for desegregating the high schools by establishing zones for attendances which were designed to achieve a high degree of racial balance throughout the system, and having provided further for continuance of a majority-to-minority transfer policy, the district judge conceived that he had obeyed the mandate of *Brown* v. *Board of Education of Topeka II*, 349 U.S. 294 (1955) (*Brown II*) and more particularly of *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). So do we. Presumably, the district judge might have ordered a further realignment when the first plan did not achieve the proper balance ratio, and yet another if that did not hold. Indeed if such were found to have been required to carry out the constitutional mandate to eliminate the vestiges of a dual system, it would simply have to be done, and we have no doubt the district judge would faithfully have carried out that duty. What he was finally faced with here, however, was rather a more subtle and lingering malaise of fear and bias in the private sector which persisted after curative action had been taken to eliminate the dual system itself. *Swann* v. *Board of Education* recognizes that this latter may be beyond the effective reach of the Equal Protection Clause:
>
> > "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disportionate racial concentrations in some schools."
> >
> > *Swann* v. *Board of Education, supra*, 402 U.S. at 23

CONCLUSION

For the foregoing reasons it is respectfully submitted: (1) that the petition should be denied and that a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should not issue in case No. 74-2100, Petitioners' appeal to the Appellate Court; and (2) as the petition by CBE to this Court, No. 75-1077, requests an affirmance of the Appellate Court decision and that of the District Court, that the petition of CBE No. 75-1077, also be denied, including No. 74-2101.

Respectfully submitted,

WITT, GAITHER, RICHARDSON, HENNISS & WHITAKER

RAYMOND B. WITT, JR.

Attorneys for Respondent
Chattanooga Board of Education
1100 American National Bank Building
Chattanooga, Tennessee 37402

Date: May 13, 1976

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APPENDIX A

Nos. 74-2100 and 74-2101

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES JONATHAN MAPP, et al.,
Plaintiffs-Appellants (74-2100),
Plaintiffs-Appellees (74-2101),

v.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, et al.,
Defendants-Appellees (74-2100),
Defendants-Appellants (74-2101).

APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed October 20, 1975.

Before: WEICK, EDWARDS and ENGEL, Circuit Judges.

ENGEL, Circuit Judge, delivered the opinion of the Court in which WEICK, Circuit Judge, joined. EDWARDS, Circuit Judge (pp. 7a-17a), delivered a separate dissenting opinion.

ENGEL, Circuit Judge. This desegregation case is once more before the court,[1] this time on cross-appeals from an order of the district court entered June 24, 1974. That order denied motions filed by both parties to modify or amend an earlier order of the court entered December 18, 1973, directed imple-

[1] For previous decisions of this court in this litigation see *Mapp* v. *Board of Education of Chattanooga*, 295 F. 2d 617 (6th Cir. 1961), 319 F. 2d 571 (6th Cir. 1963), 373 F. 2d 75 (6th Cir. 1967), 477 F. 2d 851 (6th Cir. 1973), *cert. denied* 414 U.S. 1022.

mentation of the final school desegregation plan previously approved by the court with certain modifications. The December 18, 1973 order provided as well that "[To] the extent the Court has previously given only tentative approval to the High School Zoning Plan, the same is now approved finally."

Both appeals in effect seek to relitigate all of those same issues which we decided in an en banc decision in this court, reported in *Mapp* v. *Board of Education of Chattanooga*, 477 F. 2d 851 (6th Cir. 1973), *cert. denied*, 414 U.S. 1022 (1973). We there affirmed a final plan of desegregation in all respects except as to the high schools in Chattanooga.

While the district judge had at that time approved the plan as to Kirkman Technical High School, and our affirmance made the same final, District Judge Frank W. Wilson had given only tentative approval to the plan for desegregation for other high schools in the City of Chattanooga, see *Mapp* v. *Board of Education of Chattanooga*, 341 F. Supp. 193 (E.D. Tenn. 1972), being uncertain particularly whether three rather than four general purpose high schools would be feasible or desirable in Chattanooga.

With respect to Judge Wilson's refusal to modify the previous final plan of desegregation, we find that he did not abuse his discretion in so doing, particularly since this court has given its approval of that plan.

Accordingly, we see as the sole issue remaining on this appeal the question of whether the district judge erred in ordering final approval of the tentative plan of desegregation for the Chattanooga high schools.

At the time the tentative plan was proposed, it was anticipated that the zoning for the four high schools would produce a racial balance approximately as follows:

	Black Students	White Students
Brainerd High School	32%	68%
Chattanooga High School	44%	56%
Howard High School	75%	25%
Riverside High School	75%	25%

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When, however, the plan was placed into effect in the fall of 1971 rather than having the attendance anticipated, the four high schools experienced the following racial balance:

	Black Students	White Students
Brainerd High School	39%	61%
Chattanooga High School	43%	57%
Howard High School	99%	1%
Riverside High School	99%	1%

While an actual head count had showed that as late as July 1971 there were 393 (29%) white high school students in the Howard High School zone and 311 (29%) white students in the Riverside zone, only ten reported that September to Howard and three to Riverside.

It is the contention of the plaintiffs that a school board's duty in a previously dual and segregated school system cannot be said to have been performed where, after implementation of a plan of desegregation, such an imbalance in the racial mix of the students yet remains. After taking extensive testimony on this issue and on the other issues raised by the parties' motions to amend the earlier judgment, Judge Wilson, in his Memorandum Opinion of November 16, 1973, made the following findings of fact:

> To the extent that the Court has previously given only tentative approval to the high school zoning plan, final approval will now be given that plan. Two high schools, Howard High School and Riverside High School, have not acquired an enrollment of white students as projected by the Board when the plan was proposed in 1971, but rather have remained substantially all black. It was a concern for the accuracy of these projections that caused the Court to initially give only tentative approval to the high school zoning plan. However, subsequent evidence has now demonstrated that changing demographic conditions within the City and other *de facto* conditions beyond the control and responsibility of the School Board, including

> the voluntary withdrawal of white students from the system, have become the causative factors for the present racial composition of the student body in those schools and not the original action of the Board in creating segregated schools at these locations. It should be recalled in this connection that the plan previously approved included provision for students to elect to transfer from a school in which they were in a majority to a school in which they would be in a minority.

While the cause of the departure of white students was disputed, there can be little doubt upon the record that the difference between the anticipated mix and the actual attendance of the high schools when the plan was put into effect was due to a substantial departure of white students from the public schools in Chattanooga, a circumstance which the district judge found to have occurred beyond the control and responsibility of the School Board.

No one who firmly believes in the social and educational value of racial balance in a desegregated school system can help being seriously concerned when such a plan for achieving racial balance does not achieve its objectives on implementation. That such a concern was shared by the district judge is manifest throughout the entire record upon appeal. Nevertheless, the district judge concluded that the demographic changes in the city itself were the cause of the remaining imbalance, a finding which finds support in the record and which we hold is not clearly erroneous.

We are satisfied that, in giving final approval to the high school desegregation plan, Judge Wilson was by no means yielding to irrational concerns over white flight which merely masked inherent Board resistance to integration. To the contrary, he carried out the plan in spite of the apprehended result, and beyond that resisted the defendant Board's further efforts to modify the earlier approved plan for the remainder of the system with this language in his November 27, 1973 opinion:

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"The Court is not unsympathetic to the concern expressed by the Board for minimizing the voluntary departure of white students from the system. It must be apparent, however, that this objective cannot serve as a limiting factor on the constitutional requirement of equal protection of the laws, nor as a justification for retaining *de jure* segregation. Concern over 'white flight', as the phenomenon was often referred to in the record, cannot become the higher value at the expense of rendering equal protection of the laws the lower value. As stated by the United States Supreme Court in the case of *Monroe* v. *Board of Commissioners,* 391 U.S. 450 . . . :

> "We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. 'But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of the disagreement with them.'" *Brown II* at 300, . . .

"Moreover, it is the 'effective disestablishment of a dual racially segregated school system' that is required, *Wright* v. *Council of City of Emporia,* 407 U.S. 451 . . . not, as seems to be contended by the defendants, the most 'effective' level of voluntarily acceptable 'mixing' of the races." (Footnote omitted)

Having implemented the plan for desegregating the high schools by establishing zones for attendances which were designed to achieve a high degree of racial balance throughout the system, and having provided further for continuance of a majority-to-minority transfer policy, the district judge conceived that he had obeyed the mandate of *Brown* v. *Board of Education of Topeka II,* 349 U.S. 294 (1955) *(Brown II)* and more particularly of *Swann* v. *Charlotte-Mecklinburg of Education,* 402 U.S. 1 (1971). So do we. Presumably, the district judge might have ordered a further realignment when the first plan did not achieve the proper balance ratio, and yet

another if that did not hold. Indeed if such were found to have been required to carry out the constitutional mandate to eliminate the vestiges of a dual system, it would simply have to be done, and we have no doubt the district judge would faithfully have carried out that duty. What he was finally faced with here, however, was rather a more subtle and lingering malaise of fear and bias in the private sector which persisted after curative action had been taken to eliminate the dual system itself. *Swann* v. *Board of Education* recognizes that this latter may be beyond the effective reach of the Equal Protection Clause:

> "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools."
>
> *Swann* v. *Board of Education, supra,* 402 U.S. at 23

Affirmed.

BLEED THROUGH

EDWARDS, Circuit Judge, dissenting. This appeal presents just one significant question: Should we now, under applicable Supreme Court precedent, affirm the District Judge's final order of December 18, 1973, approving a final desegregation order applicable to the Chattanooga high schools?

With all respect for the sincerity of my colleagues, I cannot join the majority opinion, or approve its result. If the majority opinion prevails in this court and in the Supreme Court, it will establish as law the proposition that approximately 60% of the black children in the high schools of the Chattanooga public school system may be continued forever in complete racial segregation in all black schools which were built as such under state law which required a racially dual school system and which have been continuously segregated as such down to this very moment. I cannot square this proposition with the great command of the Fourteenth Amendment to provide all American citizens "the equal protection of the laws."

The rule of this case is all the more significant because the smaller numbers, the maturity, and the greater mobility of high school students tend to make practical accomplishment of high school desegregation the least difficult part of the task mandated by *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954); *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968) and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

The en banc per curiam opinion of the Sixth Circuit (*Mapp* v. *Board of Education of the City of Chattanooga, Tennessee*, 477 F.2d 851 (6th Cir.), *cert. denied*, 414 U.S. 1022 (1973)) constituted unqualified approval of two previously entered opinions and judgments of Judge Wilson, *Mapp* v. *Board of Education of the City of Chattanooga*, 329 F. Supp. 1374 (E.D. Tenn. 1971); *Mapp.* v. *Board of Education of the City of Chattanooga*, 341 F. Supp. 193 (E.D. Tenn. 1972). In these two cases Judge Wilson had approved final desegregation orders concerning the grade schools and junior high schools. Equally

clearly, he had not approved any final desegregation plan for the high schools. As to the high schools, in his first opinion he said:

High Schools

During the school year 1970-71, the Chattanooga School System operated five high schools. These included four general curricula high schools and one technical high school. Kirkman Technical High School offers a specialized curricula in the technical and vocational field and is the only school of its kind in the system. It draws its students from all areas of the City and is open to all students in the City on a wholly non-discriminatory basis pursuant to prior orders of this Court. Last year Kirkman Technical High School had an enrollment of 1218 students, of which 129 were black and 1089 were white. The relatively low enrollment of black students was due in part to the fact that Howard High School and Riverside High School, both of which were all black high schools last year, offered many of the same technical and vocational courses as were offered at Kirkman. Under the defendants' plan these programs will be concentrated at Kirkman with the result that the enrollment at Kirkman is expected to rise to 1646 students, with a racial composition of 45% black students and 55% white students. No issue exists in the case but that Kirkman Technical High School is a specialized school, that it is fully desegregated, and that it is a unitary school.

While some variation in the curricula exists, the remaining four high schools, City High School, Brainerd High School, Howard High School, and Riverside High School, each offer a similar general high school curriculum. At the time when a dual school system was operated by the School Board, City High School and Brainerd High School were operated as white schools and Howard High School and Riverside High School were operated as black schools. At that time the black high schools were zoned, but the white high schools were not. When the dual school sys-

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tem was abolished by order of the Court in 1962, the defendants proposed and the Court approved a freedom of choice plan with regard to the high schools. The plan accomplished some desegregation of the former white high schools, with City having 141 black students out of an enrollment of 1435 and Brainerd having 184 black students out of an enrollment of 1344 during the 1970-71 school year. However, both Howard, with an enrollment of 1313, and Riverside, with an enrollment of 1057, remained all black. The freedom of choice plan "having failed to undo segregation • • • freedom of choice must be held unacceptable." Green v. County School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

The School Board proposes to accomplish a unitary school system within the high schools by zoning the four general curricula high schools with the following results in terms of student ratios:

	Black Students	White Students
Brainerd High School	32%	68%
Chattanooga High School	44%	56%
Howard High School	75%	25%
Riverside High School	75%	25%

The plaintiffs have interposed objections to the defendants' high school plan upon the ground that it does not achieve a racial balance in each school. To some extent these objections are based upon matters of educational policy rather than legal requirements. It is of course apparent that the former white high schools, particularly Brainerd High School, remain predominantly white and that the former black high schools remain predominantly black. However, the defendants offer some evidence in support of the burden cast upon them to justify the remaining imbalance. The need for tying the high school zones to feeder junior high schools is part of the defendants' explanation. Residential patterns, natural geographical features, arterial highways, and other factors are also part of the defendants' explanation.

A matter that has given concern to the Court, however, and which the Court feels is not adequately covered in the present record, is the extent to which the statistical data upon which the defendants' plan is based will correspond with actual experience. Among other matters there appears to be substantial unused capacity in one or more of the city high schools. Before the Court can properly evaluate the reliability of the statistical data regarding the high schools, the Court needs to know whether the unused capacity does in fact exist and, if so, where it exists, whether it will be used and, if so, how it will be used. It would be unfortunate indeed if experience shortly proved the statistical data inadequate and inaccurate and this Court was deprived of the opportunity of considering those matters until on some appellate remand, as occurred in the recent case of Davis v. Board of School Commissioners of Mobile, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577.

The plaintiff has submitted a high school plan with high school zones which the plaintiff's witness has testified will achieve a racial balance in each high school. However, this plan is not tied into the junior high school plan hereinabove approved and the Court is unable to say whether it could be so tied it. Furthermore, the same statistical problem discussed above would appear to exist with regard to the plaintiff's plan.

The Court accordingly is unable to give final approval to a high school desegregation plan at this time. Time, however, is a pressing factor. Pre-school activities will commence at each high school within less than a week, if in fact they have not already commenced. Full commencement of the fall term is only one month away. It is clear that the high schools must move at least as far as is proposed in the defendants' high school plan. Accordingly, the Court will give tentative approval only at this time to the defendants' high school plan in order that at least as much as is therein proposed may be placed into operation at the commencement of the September 1971 term of school. Further prompt but orderly judicial pro-

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ceedings must ensue before the Court can decide upon a final plan for desegregation of the high schools.

In the meanwhile, the defendants will be required to promptly provide the Court with information upon the student capacity of each of the four high schools under discussion, upon the amount of unused space in each of the four high schools, the suitability of such space for use in high school programs, and the proposed use to be made of such space, if any. In this connection the defendants should likewise advise the Court regarding its plan as to tuition students. Last year almost one-third of the total student body at City High School were non-resident tuition paying students. There is no information in the present record as to the extent the Board proposes to admit tuition students nor the effect this might have on the racial composition of the student body. The Court has no disapproval of the admission of tuition students nor to the giving of preference to senior students in this regard, provided that the same does not materially and unfavorably distort the student racial ratios in the respective schools. Otherwise, the matter of admitting tuition students addresses itself solely to the discretion of the Board. No later than the 10th day of enrollment the defendants will provide the Court with actual enrollment data upon each of the four high schools here under discussion.

Mapp v. *Board of Education of the City of Chattanooga, supra* at 1384-86.

In his second opinion he said:

Tentative approval only having heretofore been given to the School Board plan for desegregation of the Chattanooga high schools other than Kirkman Technical High School (to which final approval has been given). Further consideration must be given to this phase of the plan. At the time that the Court gave its tentative approval to the high school desegregation plan, the Court desired additional information from the Board of Education as to

> whether three, rather than four, general purpose high schools would be feasible or desirable in Chattanooga. It now appears, and in this both parties are in agreement, that three general purpose high schools rather than four is not feasible or desirable, at least for the present school year. Having resolved this matter to the satisfaction of the Court, the defendant Board of Education will accordingly submit a further report on or before June 15, 1972, in which they either demonstrate that any racial imbalance remaining in the four general purpose high schools is not the result of "present or past discriminatory action on their part" Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 26, 91 S.Ct. at 1281, 28 L.Ed.2d 554 at 572, or otherwise, and to the extent that the Board is unable to demonstrate that such racial imbalance which remains is not the result of past or present discriminatory action, they should submit a further plan for removal of all such remaining racial discrimination, the further plan likewise to be submitted on or before June 15, 1972.
>
> *Mapp* v. *Board of Education of the City of Chattanooga, supra* at 200.

The opinion and order we now review are quite different, and if approved by this Court and the Supreme Court, would represent both a final approval of the school board's current "plan" for operation of the high schools and holding that the present operation represents desegregation of the previously legally segregated dual high school system.

In the opinion we now review Judge Wilson said:

> The Court is accordingly of the opinion that the defendants have failed to establish either such changed conditions as would render its formerly court-approved plan of school desegregation inadequate or improper to remove "all remaining vestiges of state imposed segregation" or that its newly proposed plan would accomplish that result.
>
> To the extent that the Court has previously given only tentative approval to the high school zoning plan, final

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> approval will now be given that plan. Two high schools, Howard High School and Riverside High School, have not acquired an enrollment of white students as projected by the Board when the plan was proposed in 1971, but rather have remained substantially all black. It was a concern for the accuracy of these projections that caused the Court to initially give only tentative approval to the high school zoning plan. However, subsequent evidence has now demonstrated that changing demographic conditions within the City and other *de facto* conditions beyond the control and responsibility of the School Board, including the voluntary withdrawal of white students from the system, have become the causative factors for the present racial composition of the student body in those schools and not the original action of the Board in creating segregated schools at these locations. It should be recalled in this connection that the plan previously approved included provision for students to elect to transfer from a school in which they were in a majority to a school in which they would be in a minority.
>
> *Mapp* v. *Board of Education of the City of Chattanooga*, 366 F. Supp. 1257, 1260-61 (E.D. Tenn. 1973).

Thus, clearly, we now have before us the issue as to whether or not in the Chattanooga high schools previous unconstitutional segregation has been eliminated "root and branch." *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968).

Defendant-appellees accept (as they must) the responsibility of meeting the standard of *Green* v. *County School Board of Kent County, supra*:

> It is against this background that 13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of respondent School Board's "freedom-of-choice" plan to achieve that end. The School Board contends that it has fully discharged its obligation by adopting a plan by which every student, regardless of race, may "freely" choose the school he will attend. The

Board attempts to cast the issue in its broadest form by arguing that its "freedom-of-choice" plan may be faulted only by reading the Fourteenth Amendment as universally requiring "compulsory integration," a reading it insists the wording of the Amendment will not support. But that argument ignores the thrust of *Brown II*. In the light of the command of that case, what is involved here is the question whether the Board has achieved the "racially nondiscriminatory school system" *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. See *Cooper* v. *Aaron, supra,* at 7; *Bradley* v. *School Board,* 382 U.S. 103; cf. *Watson* v. *City of Memphis,* 373 U.S. 526. The constitutional rights of Negro school children articulated in *Brown I* permit no less than this; and it was to this end that *Brown II* commanded school boards to bend their efforts.[4]

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[4] "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminnate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States,* 380 U. S. 145, 154. Compare the remedies discussed in, *e. g., NLRB* v. *Newport News Shipbuilding & Dry Dock Co.,* 308 U. S. 241;

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> In determining whether respondent School Board met that command by adopting its "freedom-of-choice" plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a "prompt and reasonable start." This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for "the governing constitutional principles no longer bear the imprint of newly enunciated doctrine." *Watson* v. *City of Memphis, supra,* at 529; see *Bradley* v. *School Board, supra; Rogers* v. *Paul,* 382 U.S. 198. Moreover, a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. "The time for mere 'deliberate speed' has run out," *Griffin* v. *County School Board,* 377 U.S. 218, 234; "the context in which we must interpret and apply this language [of *Brown II*] to plans for desegregation has been significantly altered." *Goss* v. *Board of Education,* 373 U.S. 683, 689. See *Calhoun* v. *Latimer,* 377 U.S. 263. The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now.*
>
> *Green* v. *County School Board of New Kent County, supra* at 437-39.

At the outset we note that we deal with a school district which at the time of the beginning of this litigation was clearly and concededly a dual school system segregated by race according to state statute. We therefore are required to determine whether or not a public school system (racially constituted during the 1973-74 school year as follows) can be held by this court to have been desegregated "root and branch":

United States v. *Crescent Amusement Co.,* 323 U. S. 173; *Standard Oil Co.* v. *United States,* 221 U. S. 1. See also *Griffin* v. *County School Board,* 377 U. S. 218, 232-234.

	White	Black	% White	% Black
Howard	10	999	1	99
Riverside	3	721	1	99
Chattanooga	439	330	57	43
Brainerd	646	404	61	39

There can, of course, be no doubt that Howard and Riverside High Schools are "racially separate public schools established and maintained by state action." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 5 (1971). Both were built as Negro schools under state law which required a dual school system. T.C.A. §§ 2377, 2393.9 (Williams 1934). Twenty-one years after decision of *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954), both high schools (encompassing 60% of the black high school population of Chattanooga) are still (and always have been) essentially 100% black. As to these schools and students, there has been no desegregation at all.

Defendants-Appellees contend that two measures which they took should be accepted as the equivalent of desegregation. They are: 1) the inauguration of a freedom of choice plan, and 2) a change in zone boundaries which was calculated (it is claimed) to introduce 25% of white students into both high schools. Defendants-appellees freely admit that neither measure was effective in changing the segregated character of the Howard and Riverside High Schools.

At to the freedom of choice plans, the Supreme Court has repeatedly held that ineffective freedom of choice plans are not a substitute for desegregation in fact. *See Green* v. *County School Board of New Kent County, supra; Monroe* v. *Board of Commissioners of the City of Jackson,* 391 U.S. 450 (1968).

Defendants-appellees' strongest reliance is upon the second contention that they "zoned" 25% white students into Howard and Riverside but that the white students thus assigned avoided the assignment by "white-flight." As to this measure, we have

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no findings of fact concerning defendants-appellees' contention. But if we assumed their truth, we clearly would not have exhausted the possibilities for successful desegregation nor satisfied the constitutional command. Many possibilities for desegregation remain, including pairing of white and black schools and high school construction which would make desegregated zones more feasible. In any instance, the defendant school board should be required to propose a new and realistic plan to meet its constitutional duty. *See Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* at 15-21; *Brinkman* v. *Gilligan,* — F.2d — (6th Cir. 1975) (Decided June 24, 1975, No. 75-1410).

In my judgment the case should be affirmed as to the grade schools and junior high schools. The judgment should be vacated and remanded as to the high schools. All other issues presented by either party should be summarily denied.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-2100

JAMES JONATHAN MAPP, et al.,
Plaintiffs-Appellants,

v.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, et al.,
Defendants-Appellees.

ORDER

(Filed January 27, 1976)

Before: WEICK, EDWARDS and ENGEL, Circuit Judges.

This cause came on for hearing on the petition for rehearing with a suggestion that it be reheard en banc.

Judges Edwards and McCree having requested en banc rehearing for the reasons set forth in Judge Edwards' dissenting opinion, but it appearing to the court that less than a majority of the court has voted in favor thereof, the petition for rehearing was referred to the panel which originally heard the appeal and was determined not to be well taken, Judge Edwards dissenting.

It is therefore ordered that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

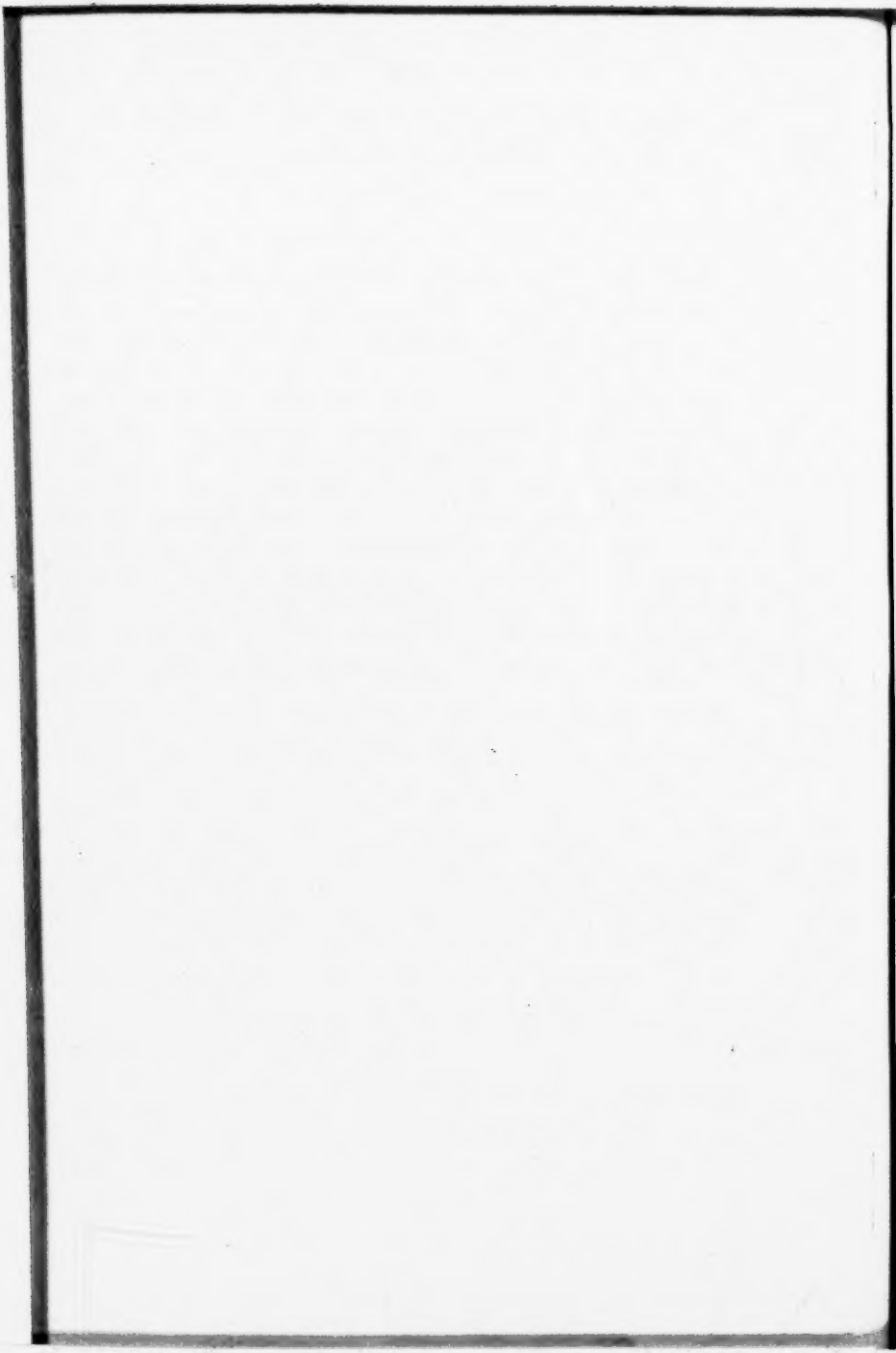
BLEED THROUGH

Re: James Jonathan Mapp v.
The Board of Education of the City
of Chattanooga, Tennessee

No. 74-2100

EDWARDS, Circuit Judge, dissenting. Although the Board of Education of the City of Chattanooga has at long last, under orders of the Supreme Court of the United States, this court, and the United States District Court, proceeded to bring both its grade schools and junior high schools into compliance with the Constitution of the United States, as to two of its high schools it has signally failed to do so. The majority opinion of this court would establish as law the proposition that approximately 60% of the black children of the Chattanooga high school system may be continued forever in complete segregation in all black high schools. The two black high schools at issue were built as such under state law that required a racially dual school system and have been continuously segregated as such down to this very moment.

There can be no doubt that the two black high schools are racially separate public schools established and maintained by state action and that as to these schools there has been no desegregation at all. In my judgment it simply cannot be said with any accuracy that the possibilities for successful desegregation have been exhausted. As to these schools the School Board should be required to propose a new and realistic and effective plan to meet its constitutional duty.



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Report #5-A Elementary Schools

CHATTANOOGA PUBLIC SCHOOLS
Chattanooga, Tennessee

COMPARISON OF TENTH DAY PUPIL ENROLLMENT FOR EACH SCHOOL BY YEAR AND BY RACE
FROM 1962-63 TO PRESENT

Elementary Schools

10th Day Enrollment (Resident and Nonresident Pupils)

School Year	Amnicola (1-6)			Avondale (1-6)			Barger (1-6)			Bell (1-6)			Brown (1-6)			Carpenter (1-6)			Chatta. Avenue (1-6)			Cedar Hill (1-6)		
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
* 1962-63	---	---	---	0	317	317	0	561	561	622	0	622	0	368	368	501	0	501	524	0	524	0	171	171
** 1963-64	---	---	---	318	170	488	0	543	543	592	0	592	0	332	332	Closed - East Fifth Street			481	0	481	0	148	148
*** 1964-65	---	---	---	639	18	657	0	569	569	573	0	573	1	319	320	---	---	---	372	0	372	0	139	139
**** 1965-66	---	---	---	629	27	656	0	547	547	564	0	564	2	306	308	---	---	---	Closed - Howard Railroad Relocation			0	196	196
***** 1966-67	---	---	---	641	18	659	0	518	518	545	0	545	114	288	402	Opened Middle School			---	---	---	0	210	210
1967-68	---	---	---	648	17	665	0	478	478	576	0	576	112	264	376	373	(1-4) 19	392	---	---	---	0	187	187
1968-69	Annexed from County			683	7	690	0	494	494	574	0	574	125	243	368	331	26	357	---	---	---	0	162	162
1969-70	69	63	132	672	5	677	2	432	434	561	6	567	122	236	358	344	10	354	---	---	---	0	176	176
1970-71	75	35	110	640	1	641	2	453	455	514	9	523	121	216	337	301	8	309	---	---	---	0	174	174
1971-72	Closed-Carpenter and Riverwont			669	0	669	71	(4-6) 258	329	416	2	418	106	205	311	406	(1-6) 46	452	---	---	---	Closed- East Lake		
1972-73	---	---	---	660	0	660	90	(4-6) 222	317	421	2	423	108	210	318	337	27	364	---	---	---	---	---	---
1973-74	---	---	---	629	0	629	93	208	301	380	2	382	101	199	300	310	13	323	---	---	---	---	---	---
1974-75																								
1975-76																								
1976-77																								
1977-78																								
1978-79																								
1979-80																								

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)

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Elementary Schools (Continued)

10th Day Enrollment (Resident and Nonresident Pupils)

School Year	Clifton Hills (1-6)			Davenport (1-6)			Donaldson (1-6)			East Chatta. (1-6)			East Fifth (1-6)			East Lake (1-6)			Eastdale (1-6)			Fort Cheatham (1-6)		
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
*1962-63	0	496	496	394	0	394	562	0	562	0	484	484	710	0	710	0	696	696	1	484	485	155	0	155
**1963-64	0	513	513	397	3	400	543	0	543	3	540	543	862	(1-6) 1	863	0	744	744	20	506	526	87	0	87
***1964-65	0	514	514	355	7	362	533	0	533	20	523	543	609	41	650	0	699	699	37	453	490	Closed Nov. 1963 (Freeway)		
****1965-66	0	516	516	354	14	368	536	0	536	21	477	498	603	32	635	0	623	623	51	440	491	---	---	---
*****1966-67	11	518	529	308	16	324	519	0	519	23	465	488	610	24	634	0	601	601	50	444	494	---	---	---
1967-68	19	465	484	284	19	303	502	0	502	16	448	464	208	(5-6) 3	211	1	562	563	71	360	431	---	---	---
1968-69	17	447	464	275	18	293	541	0	541	8	422	430	200	10	210	1	540	541	108	315	423	---	---	---
1969-70	18	446	464	255	9	264	512	0	512	7	410	417	152	4	156	1	470	471	150	261	411	---	---	---
1970-71	17	411	428	234	9	243	471	0	471	12	382	394	146	7	153	3	439	442	234	180	414	---	---	---
1971-72	27	311	338	Closed - Howard Hemlock			462	0	462	41	381	422	---	Closed ---	---	3	530	533	169	(4-6) 170	339	---	---	---
1972-73	39	359	398	---	---	---	437	0	437	91	374	465	---	---	---	2	512	514	244	142	386	---	---	---
1973-74	31	349	380	---	---	---	419	0	419	106	280	386	---	---	---	4	455	459	336	111	447	---	---	---
1974-75																								
1975-76																								
1976-77																								
1977-78																								
1978-79																								
1979-80																								

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)

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Elementary Schools (Continued)

School Year	Garber (1-6)			Glenwood (1-6)			Henry (1-6)			Hemlock (1-6)			Highland Park (1-6)			Howard (1-6)			Long (1-6)			Missionary Ridge (1-6)		
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
	10th Day Enrollment (Resident and Nonresident Pupils)																							
* 1962-63	0	338	338	19	175	194	328	0	328	0	324	324	0	415	415	684	0	684	1	320	321	5	380	385
** 1963-64	0	347	347	60	125	185	285	0	285	0	288	288	0	377	377	662	0	662	3	301	304	5	376	381
*** 1964-65	0	353	353	103	87	190	250	0	250	19	281	300	0	405	405	606	0	606	0	336	336	4	376	380
**** 1965-66	0	396	396	106	63	169	294	0	294	37	262	299	0	414	414	806	2	808	1	358	359	5	374	379
***** 1966-67	1	319	320	130	28	158	336	0	336	54	242	296	0	404	404	783	0	783	5	331	336	6	358	364
1967-68	5	317	322	141	14	155	359	0	359	89	224	313	0	364	364	726	0	726	8	384	392	5	335	340
1968-69	65	253	318	160	17	177	351	1	352	110	204	314	0	378	378	673	0	673	14	449	463	5	330	335
1969-70	155	188	343	208	7	215	408	0	408	83	184	267	0	382	382	636	0	636	29	408	437	7	327	334
1970-71	242	135	377	246	2	248	376	0	376	66	195	261	4	351	355	617	0	617	52	367	419	11	319	330
1971-72	296	91	387	Closed-M. Ridge Ridgedale-0			371	0	371	158	175	333	24	264	288	615	4	619	54	317	371	158	146	304
1972-73	310	49	359	---	---	---	339	0	339	158	159	317	17	233	250	522	4	526	42	279	321	153	92	245
1973-74	343	33	376	---	---	---	298	0	298	142	139	281	24	180	204	466	3	469	55	299	354	159	65	224
1974-75																								
1975-76																								
1976-77																								
1977-78																								
1978-79																								
1979-80																								

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)

BLEED THROUGH

COPY BOUND VERTICALLY

Elementary Schools (Continued)

School Year	Normal Park (1-6)			Oak Grove (1-6)			Orchard Knob (1-6)			Pineville (1-6)			Piney Woods (1-6)			Ridgedale (1-6)			Rivermont (1-6)			Sanderson (1-6)		
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
	10th Day Enrollment (Resident and Nonresident Pupils)																							
* 1962-63	0	552	552	0	444	444	1189	0	1189	---	---	---	---	---	---	0	344	344	---	---	---	145	0	145
** 1963-64	0	531	531	42	430	472	1185	0	1185	---	---	---	Opened January 1964 (New)			7	354	361	---	---	---	164	0	164
*** 1964-65	0	541	541	77	406	483	1048	0	1048	---	---	---	370	0	370	46	368	414	---	---	---	136	3	139
**** 1965-66	0	563	563	72	393	465	1057	0	1057	---	---	---	369	0	369	45	383	428	---	---	---	168	0	168
***** 1966-67	0	574	574	71	354	425	1033	0	1033	---	---	---	365	0	365	76	339	415	---	---	---	154	0	154
1967-68	2	586	588	67	331	398	1018	0	1018	Annexed from County			358	0	358	68	303	371	---	---	---	140	0	140
1968-69	4	565	569	61	328	389	955	0	955	0	131	131	355	4	359	83	270	353	Annexed from County			Closed-Consolidated with Howard, St. Elmo & Donaldson		
1969-70	0	535	535	66	301	367	926	0	926	0	152	152	334	4	338	93	252	345	0	554	554	---	---	---
1970-71	0	535	535	67	257	324	788	3	791	0	153	153	307	1	308	82	252	334	0	561	561	---	---	---
1971-72	2	365	367	71	226	297	731	4	735	0	153	153	277	2	279	92	201	293	73	532	605	---	---	---
1972-73	4	366	370	104	199	303	694	2	696	0	157	157	271	0	271	98	204	302	65	505	570	---	---	---
1973-74	4	406	410	119	180	299	702	1	703	1	174	175	272	0	272	98	188	286	47	455	502	---	---	---
1974-75																								
1975-76																								
1976-77																								
1977-78																								
1978-79																								
1979-80																								

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)

BLEED THROUGH

COPY BOUND VERTICALLY

Elementary Schools (Continued)

School Year	10th Day Enrollment (Resident and Nonresident Pupils)																										
	St. Elmo (1-6)			Smith (1-6)			Spears Avenue (1-6)			Sunnyside (1-6)			Trotter (1-6)			Woodmore (1-6)			Hillcrest (1-6)			Total Elementary (1-6)		
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
* 1962-63	6	338	344	601	0	601	99	0	99	14	309	323	555	0	555	0	562	562									
** 1963-64	9	351	360	558	0	558	98	0	98	38	284	322	513	0	513	0	546	546				7115	8078	15193
*** 1964-65	15	344	359	488	0	488	97	0	97	70	298	368	434	0	434	0	549	549				6932	7810	14742
**** 1965-66	17	359	376	443	0	443	100	0	100	72	269	341	431	0	431	0	566	566				6902	7629	14531
***** 1966-67	18	346	364	405	0	405	Closed-Consolidated with Brom			80	286	366	388	0	388	0	538	538				6783	7580	14363
1967-68	19	306	325	404	0	404	---	---	---	102	246	348	347	0	347	0	497	497				6726	7221	13947
1968-69	54	316	370	352	0	352	---	---	---	137	192	329	349	0	349	2	490	492				6668	6729	13397
1969-70	47	294	341	323	0	323	---	---	---	132	202	334	328	0	328	18	505	523				6593	6612	13205
1970-71	54	322	376	297	1	298	---	---	---	134	175	309	311	0	311	22	451	473				6658	6823	13481
1971-72	62	245	307	285	0	285	---	---	---	58	(1-3) 250	308	304	0	304	195	(1-3) 220	415				6446	6404	12850
1972-73	63	245	308	241	1	242	---	---	---	61	(1-3) 209	270	245	0	245	227	(1-3) 173	400				6196	5098	11294
1973-74	67	221	288	224	3	227	---	---	---	53	172	225	230	0	230	248	144	392	Annexed from County 56	374	430	6043	4725	10768
1974-75																						6017	4654	10671
1975-76																								
1976-77																								
1977-78																								
1978-79																								
1979-80																								

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)

BLEED THROUGH

COPY BOUND VERTICALLY

Report #5-B Junior High Schools

Junior High Schools

10th Day Enrollment (Resident and Nonresident Pupils)

School Year	Alton Park (7-9)			Brainerd (7-9)			Dalewood (7-9)			East Fifth (-)			East Lake (7-9)			East Side (7-9)			Hardy (7-9)			Howard (7-9)		
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
* 1962-63	816	0	816	0	1100	1100	Opened Fall 63-64 (New)			329	0	329	0	637	637	0	610	610	0	611	611	887	0	887
** 1963-64	837	0	837	0	590	590	0	467	467	Closed-Transferred to Riverside			0	605	605	0	559	559	0	546	546	879	0	879
*** 1964-65	905	0	905	0	600	600	0	491	491	---	---	---	0	589	589	0	587	587	0	473	473	853	0	853
**** 1965-66	913	0	913	7	607	614	9	522	531	---	---	---	0	580	580	27	627	654	99	440	539	740	1	741
***** 1966-67	893	0	893	33	649	682	28	579	607	---	---	---	0	621	621	91	618	709	217	356	573	652	0	652
1967-68	888	0	888	53	661	714	37	613	650	339	(7-8) 6	345	1	602	603	112	646	758	331	292	623	619	0	619
1968-69	889	4	893	58	621	679	55	590	645	296	8	304	1	595	596	119	629	748	304	305	609	612	1	613
1969-70	843	7	850	61	565	626	72	542	614	290	1	291	0	565	565	118	606	724	384	268	652	642	0	642
1970-71	835	7	842	67	521	588	105	470	575	243	2	245	1	531	532	130	593	723	426	190	616	622	0	622
1971-72	781	3	784	115	370	485	200	326	526	335	(7-9) 1	336	1	447	448	148	476	624	550	166	716	552	0	552
1972-73	741	2	743	145	306	451	245	219	464	309	(7-9) 1	310	3	438	441	113	389	502	508	139	647	513	0	513
1973-74	655	2	657	157	250	407	348	197	545	279	1	280	1	380	381	126	365	491	505	96	601	473	1	474
1974-75																								
1975-76																								
1976-77																								
1977-78																								
1978-79																								
1979-80																								

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)

BLEED THROUGH

COPY BOUND VERTICALLY

Junior High Schools (Continued)

School Year	10th Day Enrollment (Resident and Nonresident Pupils)																										
	Kirkman (9)			Long (7-9)			Lookout (7-9)			North Chattanooga (7-9)			Orchard Knob (7-9)			Park Place (7-9)			Riverside (7-9)			Total Junior High (7-9)		
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
* 1962-63	0	177	177	0	134	134	0	186	186	0	530	530	762	0	762	247	0	247	---	---	---	3043	3985	7028
** 1963-64	0	165	165	0	118	118	0	165	165	0	589	589	752	0	752	Closed Riverside			850	0	850	3318	3804	7122
*** 1964-65	0	153	153	0	125	125	0	148	148	0	603	603	797	0	797	---	---	---	894	0	894	3449	3769	7218
**** 1965-66	---	Closed ---	---	4	135	139	37	149	186	12	625	637	798	0	798	---	---	---	785	0	785	3431	3686	7117
***** 1966-67	---	---	---	7	134	141	54	156	210	36	581	617	745	0	745	---	---	---	598	2	600	3354	3696	7050
1967-68	---	---	---	10	141	151	71	165	236	54	605	659	696	0	696	---	---	---	181	(9) 0	181	3392	3731	7123
1968-69	---	---	---	33	185	218	77	161	238	61	674	735	675	0	675	---	---	---	184	0	184	3364	3773	7137
1969-70	---	---	---	35	175	210	70	147	217	63	744	807	623	0	623	---	---	---	165	0	165	3366	3620	6986
1970-71	---	---	---	28	165	193	89	148	237	62	723	785	653	0	653	---	---	---	138	0	138	3399	3350	6749
1971-72	---	---	---	21	151	172	84	115	199	57	651	708	493	0	493	---	---	---	Transferred to East Fifth St.			3337	2706	6043
1972-73	---	---	---	28	149	177	83	123	206	63	589	652	457	0	457	---	---	---	---	---	---	3208	2355	5563
1973-74	---	---	---	28	165	193	87	102	189	78	567	645	385	0	385	---	---	---	---	---	---	3122	2126	5248
1974-75																								
1975-76																								
1976-77																								
1977-78																								
1978-79																								
1979-80																								

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)

BLEED THROUGH

COPY BOUND VERTICALLY

Report #5-C Senior High Schools

Senior High Schools

School Year	10th Day Enrollment (Resident and Nonresident Pupils)																									Total Senior High (10-12)		
	Brainerd High (10-12)			Chattanooga High (10-12)			Howard High (10-12)			Kirkman Technical (10-12)			Riverside High (10-12)															
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
* 1962-63	0	896	896	0	1059	1059	1580	0	1580	0	989	989	---	---	---											1580	2944	4524
** 1963-64	0	1001	1001	0	1189	1189	1033	0	1033	0	1037	1037	944	0	944											1977	3227	5204
*** 1964-65	0	1070	1070	0	1295	1295	1177	0	1177	0	1051	1051	1111	0	1111											2288	3416	5704
**** 1965-66	0	1103	1103	0	1253	1253	1304	0	1304	0	1080	1080	1260	0	1260											2564	3436	6000
***** 1966-67	26	1085	1111	35	1225	1260	1348	0	1348	1	1057	1058	1389	0	1389											2799	3367	6166
1967-68	54	1089	1143	57	1227	1284	1407	0	1407		1069	1072	1341	1	1342											2862	3386	6248
1968-69	88	1131	1219	66	1264	1330	1427	0	1427	29	1079	1108	1267	0	1267											2877	3474	6351
1969-70	170	1224	1394	83	1359	1442	1415	0	1415	64	1118	1182	1124	0	1124											2856	3701	6557
1970-71	184	1160	1344	141	1294	1435	1313	0	1313	129	1089	1218	1057	1	1058											2824	3544	6368
1971-72	463	933	1396	369	733	1102	1089	44	1133	274	818	1092	693	25	718											2888	2553	5441
1972-73	509	766	1275	394	611	1005	941	7	948	366	761	1127	640	4	644											2850	2149	4999
1973-74	528	639	1167	369	502	871	887	5	892	424	660	1084	615	4	619											2823	1810	4633
1974-75																												
1975-76																												
1976-77																												
1977-78																												
1978-79																												
1979-80																												

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)